15900

(17,033.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 448.

MARCUS A. SPURR, PETITIONER,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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Transcript of Record.

U. S. Circuit Court of Appeals, Sixth Circuit.

MARCUS A. SPURR
vs.
UNITED STATES.

Stipulation.

There being much of the transcript in this case which is not material to be considered in determining the questions presented by the present writ of error, and much of the assignment of errors being a verbatim duplication of matter contained in the bill of exceptions—for the purpose of limiting the printed record practically to the questions now involved and saving expense in printing, it is agreed:

I.

That the following parts of the transcript may be omitted entirely from the printed record:

1. Minute entries showing return and amendment of indictments, and the indictments themselves and all indorsements thereon.
2. All subsequent minute entries prior to that of the verdict of the jury upon the last trial, and all entries of designations of judges in the transcript.
3. The specification of grounds of motion for new trial.

II.

That the following portions of the assignment of errors, being verbatim duplications from the bill of exceptions, may be omitted in the printing of the assignment of errors—the pages containing the duplicated portions of the bill of exceptions when printed being referred to instead.

(NOTE BY THE CLERK.—The twelfth assignment of error is seen by reading from the words, "In the opening statement" on page 54 to the words, "statements respecting its affairs" on page 62, and concluding with the paragraph beginning with the words, "It was error to admit the testimony" at end of eleventh assignment on page 19, printed record. The seventeenth assignment is seen by reading from the words, "with respect to the two" on page 65 to the words, "with Latham, Alexander & Co." on page 77, and ending with the paragraph beginning with the words, "It was error to admit the testimony" at end of sixteenth assignment on page 21, printed record.)

1. The entire 12th assignment of error, except the final paragraph on page 68 of the transcript, beginning with the words, "It
2 was error to admit the testimony of these transactions"—the omitted matter being contained in the bill of exceptions on pages 114 to 122 of the transcript filed.

2. The entire 17th assignment of error, except the final paragraph on page 82 of the transcript, beginning with the words, "It was error to admit the testimony relating to these two accounts"—the omitted matter being contained in the bill of exceptions on pages 125 to 138 of the transcript filed.

III.

That the remaining portions of the transcript may be printed in the following order:

1. This stipulation.
2. Petition for writ of error.
3. Writ of error.
4. Citation and service.
5. Entry of verdict, and all subsequent minute entries except designations of judge; also appearance bond.
6. Assignment of errors, as indicated above.
7. Bill of exceptions, entire.
8. Certificate.

IV.

It is understood, of course, that this stipulation does not affect the integrity of the whole record as filed, and unprinted portions thereof may be used in argument and copied into briefs of counsel, when desired, as if the whole were printed, and if so used or referred to shall be printed in briefs of counsel.

This 1st day of June, 1897.

PITTS & MEEKS,
Att'ys for Pl'ff in Error.
ED. BAXTER,
Special Ass't to U. S. Dist. Att'y, Middle Dist. of Tenn.

Blanks to be filled before this is filed.
Blanks filled June 4, 1897.
PITTS & MEEKS.
ED. BAXTER,
By W. G. H.

No. 502. Marcus A. Spurr, pl'ff in error, *vs.* United States, def't in error. Stipulation. Filed June 5, 1897. Frank O. Loveland, clerk.

3 Circuit Court of the United States, Middle District of Tennessee.

UNITED STATES
vs.
MARCUS A. SPURR.

The above-named defendant, Marcus A. Spurr, conceiving himself aggrieved by the verdict and judgment in this cause, doth pray a writ of error from the said judgment rendered on the 12th day of December, 1896, and that his said writ of error be allowed; defend-

ant also prays that a transcript of the record and proceedings upon which said judgment is based, duly authenticated, together with his assignment of errors herewith filed may be sent to the circuit court of appeals for the sixth circuit of the United States, to the end that said judgment may be reversed.

MARCUS A. SPURR, *Defendant.*

PITTS & MEEKS,
Attorneys for Defendant.

The foregoing petition is allowed.
Feb. 18, 1897.

H. F. SEVERENS,
U. S. Dist. Judge.

Filed Feb'y 18, 1897.

H. M. DOAK, *Clerk.*

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } ss:

The President of the United States to the honorable the judge of the circuit court of the United States for the middle district of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between The United States, plaintiff, and Marcus A. Spurr, defendant, a manifest error hath happened, to the great damage of the said defendant, Marcus A. Spurr, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein
4 given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the sixth circuit, together with this writ, so that you have the same at Cincinnati, in said circuit, on the* 18th day of March next, in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of February, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America the one hundred and twenty-first.

H. M. DOAK,
Clerk of the Circuit Court of the United States.

Allowed by—
H. F. SEVERENS,
U. S. District Judge.

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* Not exceeding 30 days from the day of signing the citation.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } ss:

To The United States, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the* 18th day of March next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the middle district of Tennessee, wherein Marcus A. Spurr is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 19th day of February, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America, the one hundred and twenty-first.

H. F. SEVERENS,
U. S. Dist. Judge.

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* Not exceeding 30 days from the day of signing.

Service of the within citation acknowledged.

TULLY BROWN,
U. S. Dist. Att'y.

M'ch 9, '97.

On Friday, April 17th, 1896, the following order was entered:

"UNITED STATES *vs.* MARCUS A. SPURR. } 7994, Consolidated.

Came the United States attorney, and also the defendant in proper person, and came also the jury heretofore impaneled, and upon their oaths do say that they find the defendant guilty as charged in the indictment upon the last three certified checks in the indictment and recommend him to the mercy of the court.

And thereupon came the defendant, by counsel, and also in proper person, and defendant having been granted by the court time to present his exceptions to the charge of the court and to the action of the court on defendant's special instructions, until the jury should return their verdict, said exceptions were immediately filed upon return of the verdict.

And thereupon, upon motion of defendant, he is allowed forty days' time from this date in which to enter a motion for a new trial, and reasonable time after said motion is disposed of, in case the same should be overruled, to prepare and file his bill of exceptions; and in the meantime it is ordered that defendant stand upon his

present bond to await the judgment and sentence of the court, and this case is continued until the next term of the court."

At a circuit court of the United States, begun and held at the Federal court-room in the city of Nashville, on the third
6 Monday of April, A. D. 1895, present and presiding the Hon. Horace H. Lurton, circuit judge, and Henry F. Severens, sitting by designation, etc.

On May 23rd, 1896, came the defendant and filed his motions in arrest of judgment and for a new trial, which were as follows:

"UNITED STATES
vs.
M. A. SPURR. } Motion in Arrest of Judgment.

And now, on this the 23rd day of May, 1896, comes the defendant in proper person, and by his counsel, and moves the court to arrest judgment herein.

First. For insufficiency of the indictment; and

Second. Because the verdict is uncertain and insufficient to warrant a judgment.

PITTS & MEEKS,
Att'ys for Defendant."

"UNITED STATES
vs.
M. A. SPURR. } Motion for New Trial.

And now, on this the 23rd day of May, 1896, comes the defendant in proper person and by his counsel, and without waiving his motion in arrest of judgment, but relying on the same, and in the event the said motion shall be overruled, moves the court for a new trial on the following grounds:

"UNITED STATES
vs.
MARCUS A. SPURR. } 7994, Consolidated.

Came The United States, by Tully Brown, district attorney, and the defendant, as well in proper person as by his attorneys, Pitts & Meeks, when defendant's motion in arrest of judgment and for a new trial, heretofore entered in this cause, was submitted upon argument of counsel, and was taken under advisement by the court. It was ordered by the court that counsel for defendant submit their brief to the district attorney within twenty days from this date; that the district attorney, within five days after the receipt
7 of defendant's brief, submit his reply to defendant's counsel, and that defendant's counsel, within five days after the receipt of said reply, submit their rejoinder to the district attorney. It is further ordered by the court that the defendant stand upon his present bond to await the further action of the court in this case.

It is further ordered by the court, by and with the consent of counsel, that the time within which defendant may prepare bill of

exceptions is hereby extended a reasonable time after the motion in arrest of judgment and for a new trial shall have been disposed of, to be prescribed by the court upon the disposal of said motions.

At a circuit court of the United States, begun and held at the Federal court room in the city of Nashville, on the third Monday of October, 1896, present and presiding, the Hon. Henry F. Severens, judge, etc.

On Saturday, Dec. 12th, 1896, and during said term, the following order was entered:

UNITED STATES
vs.
MARCUS A. SPURR. } 7994. Consolidated.

Indictments Nos. 7994, 8078, and 8139 for false certification of checks.

Came the United States, by Tully Brown, and the defendant, M. A. Spurr, in proper person, and by Pitts & Meeks, his attorneys, and the motion of the defendant for an arrest of judgment and for a new trial heretofore made and argued, and the court upon due consideration thereof, orders and adjudges that each of said motions be overruled and disallowed.

And thereupon, the United States, by its district attorney, moved the court for sentence upon the verdict of the jury heretofore rendered, upon counts Nos. 2 of indictment No. 7994, count No. 2 of indictment No. 8139, count No. 1 and 4 of indictment No. 7994, count No. 3 of indictment No. 8139, count No. 2 of indictment 8078 and count No. 5 of indictment No. 8139. The defendant was thereupon called upon by the court to stand and was asked by the court if he had anything further to say why the sentence of the law should not be pronounced against him, and he replied that he had nothing further to say than he had already said; and the court, being
8 cognizant of the facts attending said verdict and of the manner in which the issues found by said verdict were submitted to the jury, finds and so orders and adjudges that said verdict is applicable to indictment No. 7994, counts 1 and 4, and indictment No. 8139, count 3, all of which are based upon a check certified by the defendant, dated January 3rd, 1893, and upon said verdict upon said counts of said indictments, the court orders and adjudges that the defendant be confined in the penitentiary of the State of New York, at Albany, New York, for two years and six months from this date.

And upon motion of defendant, by his attorneys, accompanied by a statement that the defendant contemplates suing out a writ of error operating as a supersedeas, it is ordered and adjudged by the court that the execution of the foregoing sentence be suspended until January, 1897, and that the defendant execute a bond before the clerk of this court with sufficient sureties in the penalty of ten thousand dollars, payable as required by law, and conditioned that the said Marcus A. Spurr shall appear on the 13th day of January, A. D.

1897, and deliver himself up to the marshal for said district to undergo said sentence; or shall, meantime, have sued out and obtained said writ of error to the Supreme Court of the United States, and shall appear upon the third Monday of April, 1897, and from time to time thereafter, until said writ of error shall have been disposed of, and deliver himself up to said marshal, to undergo said sentence, or in case said writ of error shall be disposed of in his favor, he shall appear from time to time in this court until the cases then left pending against him shall be disposed of.

It is further ordered that until said bond be executed before the clerk of this court, the defendant be in the custody of the United States marshal for this district.

It is further ordered and adjudged by the court, upon motion of counsel for defendant, that sentence upon count No. 2 of indictment No. 7994, count No. 2 of indictment No. 8139, count No. 2 of indictment No. 8078 and count No. 5 of indictment No. 8139 be deferred until the first day of the next regular term of this court.

It is further ordered and adjudged by the court that upon a writ of error being sued out by the defendant and granted, the same shall operate as a supersedeas, until the determination of such writ of error, without further order.

It is further ordered that the defendant have until the 13th
9 day of January next to make up and file bill of exceptions and assignments of error and make his application for a writ of error.

Present and presiding, Hons. H. H. Lurton, Henry F. Severens and Chas. D. Clark, judges.

On Saturday, January 9th, 1897, the following order was made:

"UNITED STATES
vs.
MARCUS A. SPURR. } 7994. Consolidated.

In this case it being made to appear satisfactorily to the court that it has not been and will not be practicable to prepare and settle a bill of exceptions within the time limited by the previous order of the court in this behalf, it is now, on motion of Messrs. Pitts & Meeks, counsel for defendant,

Ordered that the time for settling bill of exceptions be, and the same is hereby, extended until the expiration of the fifteenth day of February next."

Present and presiding, the Hons. H. F. Severens and C. D. Clark, judges.

Monday, February 15th, 1897, the following order was entered:

"UNITED STATES
vs.
MARCUS A. SPURR. } 7994. Consolidated.

The time heretofore limited for the settlement of the bill of ex-

ceptions in this cause is hereby extended until the 25th day of February, inst.

Let the foregoing order be entered of record.

February 15th, 1897.

H. F. SEVERENS,
U. S. Judge, under Designation."

10 Present and presiding, the Hons. Horace H. Lurton and Chas. D. Clark, judges, etc.

On Friday, March 5th, 1897, the following order was entered:

"UNITED STATES
vs.
MARCUS A. SPURR. } 7994. Consolidated.

In this cause, upon application of the attorneys for the defendant, it is ordered by the court that the time heretofore limited for the filing of the record in this cause be extended until April 1st, 1897."

On Wednesday, March 10th, 1897, the following order was entered:

"UNITED STATES
vs.
MARCUS A. SPURR. } No. 7994. Consolidated.

On motion, this day, before Hon. H. H. Lurton, judge of the United States, by the district attorney, for an order requiring defendant to find bail for his personal appearance herein upon final judgment on the writ of error sued out by him in this cause, it appears to the court that in the order and judgment herein of Dec. 12, 1896, it was recited that it was suggested that defendant purposed suing out a writ of error from the Supreme Court of the United States to reverse said judgment after settlement of the bill of exceptions, and was provided that in the event such writ of error was obtained the same should operate as a supersedeas, and bond was directed to be given by defendant in the sum of ten thousand dollars conditioned for his appearance in this court upon final judgment on said writ of error in case a writ of error should be sued out by him, which bond the defendant acaccordingly gave, and the same was duly approved. It further appears to the court that after said judgment and order of December 12, 1896, and before the bill of exceptions was settled and filed, and before any writ of error herein was applied for and obtained by the defendant, jurisdiction thereof was by act of Congress conferred upon the United
11 States circuit court of appeals for the sixth circuit; and that since the passage of said act of Congress, the defendant has filed his bill of exceptions, duly signed by the Hon. H. F. Severens, U. S. district judge trying the cause, and has also sued out a writ of error from the said United States circuit court of appeals for the sixth circuit, to reverse the judgment aforesaid, which was by the said H. F. Severens, judge, duly allowed, and that citation thereon

has been issued and service thereof acknowledged by the United States district attorney for the middle district of Tennessee.

And the court being of opinion that it is proper to require the defendant to find new bail, in accordance with the motion of the district attorney.

It is ordered that the defendant find bail in the sum of ten thousand dollars, with sureties to be approved by the court or by H. M. Doak, clerk, conditioned that he will be and appear in the circuit court of the United States for the middle district of Tennessee, on and after the filing in said court of the mandate of the said United States circuit court of appeals, and from time to time as he may be required, to answer any further proceedings and abide by and perform any judgment which may be had or rendered therein in this case, and that he will abide by and perform any judgment which may be rendered or affirmed against him in the said circuit court of appeals; and, upon the execution and approval of such bond as above prescribed, the said defendant shall be discharged from further custody under the judgment and proceedings heretofore had in the case, pending the hearing of the said writ of error, or until the further order of the court.

And thereupon came defendant and his sureties, and execute bond in accordance with this order, and the same is approved by the court.

HORACE H. LURTON,
Circuit Judge, &c."

The said bond is as follows:

UNITED STATES OF AMERICA, } ss:
Middle District of Tennessee, }

We, Marcus A. Spurr and Alex. Perry, Guilford Dudley and J. H. McPhoil, jointly and severally acknowledge ourselves indebted to the United States of America in the sum of ten thousand dollars, lawful money of the United States of America, to be levied of our and each of our goods and chattels, lands and tenements, upon this condition:

Whereas the said Marcus A. Spurr has sued out a writ of
12 error from the judgment of the circuit court of the United States for the middle district of Tennessee in cause No. 7994, consolidated, of said court, being The United States *vs.* Marcus A. Spurr, for a review of said judgment in the United States circuit court of appeals for the sixth circuit:

Now, if the said Marcus A. Spurr shall be and appear in the circuit court of the United States for the middle district of Tennessee on and after the filing in said court of the mandate of the said circuit court of appeals, and from time to time thereafter as he may be required, to answer any further proceedings and abide by and perform any judgment which may be had or rendered therein in this case, and shall abide by and perform any judgment which may be rendered or affirmed against him in the said circuit court of appeals,

and not depart said court without leave thereof, then this obligation shall be void; otherwise to remain in full force and virtue.

Witness our hands and seals this 10th day of March, 1897.

MARCUS A. SPURR.	[SEAL.]
ALEXANDER PERRY.	[SEAL.]
GUILFORD DUDLEY.	[SEAL.]
J. H. McPHOIL.	[SEAL.]
——— ———.	[SEAL.]
——— ———.	[SEAL.]

Taken and approved this 10th day of March, 1897, before me—

HORACE H. LURTON,
Circuit Judge.

Circuit Court of the United States for the Middle District of Tennessee.

UNITED STATES
vs.
MARCUS A. SPURR.

Assignment of Errors. Filed Feb'y 18, 1897. *H. M. Doak, Clerk.*

And now comes the defendant, Marcus A. Spurr, by his attorneys, Pitts & Meeks, and says that in the record and proceedings in the above-entitled cause there is manifest error in the following particulars, that is to say:

13 I.

In the following paragraph of the charge of the court to the jury:

"It was the defendant's duty before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn. From the existence of such a duty you may draw an inference of fact that he did so inform himself, if he did not already know it. But the presumption of knowledge is not an absolute one, and the defendant may show, if he can, that he did not, in fact acquire information of the truth."

II.

In the modification of defendant's 3d request for special instructions by the addition of the words inclosed in brackets at the end thereof, the said special instruction as so modified and given being as follows:

"If you believe from the proof that at the organization of this bank the cashier was a man of experience in the details of the banking business, and that the president was without experience or special knowledge in such matters, and if you further find that in view of these facts it was then understood and agreed by the board of directors that the cashier was to have immediate charge and supervision of the details, books, accounts and internal affairs of the

bank, and that the president was to give his attention to working up custom and patronage and looking after such special matters as should be referred to him for his attention, it will be proper for you to keep in mind these facts together with the by-laws relating to those two officers in connection with the other proof in the case bearing on the question whether the defendant had knowledge of the state of accounts of Dobbins & Dazy at the time when he certified the checks of that firm which are mentioned in the indictment, and give to them such weight as you think they are justly entitled to on the question whether or not the defendant did actually know the state of that account at the time he certified said checks. (But these are part only of the facts which you should consider upon the question of the defendant's knowledge; and further this instruction is to be taken with the other instruction that actual knowledge is not necessary if the defendant purposely abstained from inquiry.)"

III.

In the refusal by the court of defendant's 4th request for special instructions, which was as follows:

14 "If you believe from the proof that the management of the details and accounts of the banks was entrusted specially to the cashier and not to the president, and that the cashier was directed by the executive committee of the bank to look specially after the account of Dobbins & Dazy, and that it was not at any time referred to or placed in the hands or under the charge of the defendant, nor his attention called to it, and that he was assigned to other duties, then no inference of the defendant's knowledge of the state and condition of that account should be drawn from the mere fact that the account appeared on the books of the bank to be overdrawn, for knowledge of the contents of the books cannot be imputed to the defendant simply because he was president or director."

IV.

In the refusal by the court of defendant's 6th request for special instructions, which was as follows:

"It is incumbent on the Government to prove to your satisfaction beyond a reasonable doubt, that at the time defendant certified the checks mentioned in the indictment he actually knew that Dobbins & Dazy did not have on deposit in the bank funds and credits sufficient in amount to cover the checks certified by him. It is not sufficient for the Government to show that it was the defendant's duty to know this fact, and that he neglected it; nor that he could have known or ascertained the fact by inquiry of the clerks or by examination of the books; nor that he was careless or negligent or overconfident in the correct management of the account by the cashier; nor that he had the opportunity to know the fact and failed to avail himself of it; but it must appear by the proof, beyond a reasonable doubt, that he did actually know, at the time he certified the checks, that sufficient funds were not on deposit to meet

the checks, and that he certified them willfully and with such knowledge."

V.

In the modification of defendant's 2nd request for special instructions by the addition of the words inclosed in brackets at the end thereof, said special instruction, as so modified and given, being as follows:

2. "Certain by-laws of this bank have been put in evidence before you, relating to the duties and responsibilities of the cashier and president, and these by-laws, being numbers 8 and 9, having been read and commented on in the argument, I instruct you that the former, relating to the duties and responsibilities of the cashier, means that he, the cashier, shall be responsible generally for all the moneys, funds and valuables of the bank, and requires him to faithfully apply and account for all its moneys, funds and valuables, and that he is primarily charged with the faithful keeping and accounting for the same. The latter, relating to the duties and responsibilities of the president, means that he is to be held responsible only for such sums of money and property of the bank as may be entrusted to his care or placed in his hands by the board of directors, or by the cashier, or which may otherwise come into his hands as president, and that he is to be responsible only for such sums of money and property as may be placed or come into his hands, and is to faithfully and honestly apply and account for the same and otherwise faithfully discharge his duties as president. These two by-laws, taken together, mean and imply that the cashier is primarily responsible for all the funds, property and valuables of the bank, and that the president is responsible only for such funds, property and valuables of the bank as may be placed in his hands as president, and that both of these officers are each to faithfully and honestly discharge their respective duties." "(But I further charge you that the president is a general officer of the bank, and it is admitted that he had authority, notwithstanding those by-laws, to certify checks, and when the president assumed to certify these checks as good, the faithful and honest discharge of his duties required him to be informed of the condition of the account on which they were drawn.)"

VI.

In the following language of the charge of the court to the jury:

"The Government is bound, in order to maintain any of the counts in these indictments, to prove:

First. That the defendant certified the check.

Second. That the drawers of the check had not sufficient funds in the bank to meet such check.

Third. That the defendant knew that there were no funds of the drawer in the bank sufficient to meet them. This last element of the offense charged will be explained and its modification stated further on."

16

VII.

In the modification of defendant's 5th request for special instructions by the interlineation of the words inclosed in brackets, namely: "Besides the overdraft then existing," which special instruction, as so modified, was as follows:

"If you find from the proof that the account of Dobbins & Dazy upon the books of the bank was overdrawn continuously during the period covered by the checks certified by the defendant, and that the defendant was in fact ignorant of such overdraft; and that he certified the several checks mentioned in the indictment, believing at the time that the exchange deposited by Dobbins & Dazy on the days upon which said checks were certified was sufficient to cover the amount of said checks (besides the overdraft then existing), then he is not guilty, and you should acquit him, unless such ignorance of the overdraft was willful as elsewhere explained in the court's instructions."

VIII.

In the refusal of the defendant's 7th request for special instructions, which was as follows:

"If you find from the proof that the defendant believed and understood, at the time the account of Dobbins & Dazy was taken, and during its existence at the Commercial national bank, that they were engaged in the purchase of cotton and its shipment to New York and other eastern points; that they had numerous branch offices and agents in various States of the South, where the cotton was purchased; that the Nashville office was the parent office of the firm, upon which drafts were drawn by the branches and agents at other points for the payment of the cotton so purchased, accompanied with bills of lading; that the payment of these drafts drawn upon the parent house required large amounts of money; that to provide such funds, the parent house expected to deposit, and that they were depositing to their credit in the Commercial national bank, drafts on their correspondents in New York, secured by bills of lading for cotton, and then drawing their checks on the Commercial national bank against such deposits; and that their deposits were expected to consist, and did consist mainly of such New York drafts. If you believe from the proof that the

17 defendant understood and believed that this course of business was to be, and was in fact being, pursued by Dobbins & Dazy at Nashville, and that the volume of such business would be large, and likely to require the sale of exchange by the bank in order to keep supplied in cash funds, and the defendant had no knowledge at the time he certified the checks mentioned in the indictment that Dobbins & Dazy, instead of conducting a legitimate business in this way, were wiring money to New York through another bank in order to sustain the system of kiting as developed by the proof on this trial, and that having no knowledge of the overdraft of Dobbins & Dazy's account in the bank, the defendant had in mind the course of business as he understood it to be, and supposed they were making such daily deposits of New York exchange

and then drawing against them, and that in each instance where he certified a check he had information from the cashier or exchange clerk upon which he relied in good faith that a sufficient amount had been deposited that day and was in bank, to cover the check certified, he would not be guilty under the indictment, and you should acquit him."

IX.

In the following portion of the charge of the court, being the latter portion of defendant's 7th request for special instructions, modified by the court by the addition of the words inclosed in brackets, and being, as so modified and given, as follows:

"(If you find) that in each instance where he certified a check the defendant had information from the cashier or exchange clerk, upon which he relied in good faith that a sufficient amount had been deposited that day and was in the bank, to cover the check certified, (I add, in addition to the existing overdraft), he would not be guilty under the indictment, and you should acquit him."

X.

In the refusal of defendant's 9th request for special instructions in connection with the 8th, which was given, which 9th request was as follows:

9. "The defendant's want of knowledge of the state of the account of Dobbins & Dazy at the time he certified the checks, will be a complete defense to him unless you are satisfied beyond a reasonable doubt that such want of knowledge proceeded from a will to disobey the law, or from an indifference to its command."

18 XI.

In the action of the court in responding to a question of the jury on their return into court after being charged, in reading twice section 5208 of the Revised Statutes and in failing to read and explain the act of Congress of 1882, on which the indictment is based, in response to the jury's question and in the further instructions of the court in that connection, which were not called for by the jury—which question, action of the court thereon and further instructions, were as follows:

"The jury came into court and asked the following question, which was written out in pencil and handed to the court: 'We want the law as to the certification of checks when no money appeared to the credit of the drawer.'

The COURT: The jury state they want the law as to the certification of a check when there is no money to the credit of the drawer.

I cannot better answer this question, which the jury has put to the court, than by reading the section of the Revised Statutes, which relates to that subject:

'It shall be unlawful for any officer, clerk or agent of any national banking association, to certify any check drawn upon the association unless the person or company drawing the check has on de-

posit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check.'

The COURT: Does this answer your question?

FOREMAN OF THE JURY:

A. Yes, sir.

The COURT: I read it again, so that you may all understand it. (Court reads that part of sec. 5208, R. S. as quoted.)

The COURT: Is that all, gentlemen? The $30,000 was the credit allowed, and these overdrafts, as the court understands from the testimony in the case, were in excess of that. The account of Dobbins & Dazy—the overdrafts—were in excess of the amount which Dobbins & Dazy had as a limit or line of credit.

I charge you, in addition to the instructions I gave you this morning, that a check drawn upon a bank where the drawer has no funds, creates no obligation against the bank, and it does not create any obligation until it is certified as good by an officer of the bank, and that makes the check good as to the holder of it, and the
19 bank then becomes estopped, although there was no warrant for the drawing of the check, as against the *bona fide* holder. So that, the obligation of the bank to meet it is made so by the act of the officer who certifies it to be good. That is what is meant by false certification. It is the certifying by an officer of a bank that a check is good when there are no funds there to meet it."

It was error to admit the testimony relating to these transactions of 1886 and 1887, over the said objection of defendant. Said objection should have been sustained, and such testimony rejected.

XIII.

In the following language of the charge of the court, on the subject of the transactions mentioned in the 12th assignment of error:

"The using, by its officers, of the funds and credits of a national bank in speculation on stock and cotton exchanges carried on in the interest of the bank or its officers as individuals, or any other persons, is unlawful; their franchises do not contemplate such operations and it is an abuse of the lawful powers of the bank, and such use is a misapplication of the property of the bank. The fact, if it be such, that other national banks, however numerous they were, were engaged in such business, did not render it legal, nor can the opinion of other persons that it was proper, rightfully affect the view which the court and jury must take of the legality of such practices. If the jury find from the evidence that Mr. Porterfield was engaged, with the knowledge of Spurr, in thus misusing the credits and funds of the bank on cotton and stock exchanges in speculations in his own, or other persons' interest, the jury are at liberty to find in that a reason why Mr. Spurr should not have confidence in Mr. Porterfield's integrity and fidelity to the interests of the bank, and why Mr. Spurr would, in the exercise of his own duties, have exercised a closer scrutiny of the dealings of Dobbins & Dazy with the bank, especially if he had reason to suppose that firm was engaged in such speculations."

XIV.

In the refusal of defendant's 13th request for special instructions, on same subject which was as follows:

"Although a national bank has no authority by law to receive and execute orders from its customers for the purchase and sale
20 of stocks and bonds upon margin, yet if you find from the proof that it was customary for the national banks of this city to do such business and that the Commercial national bank did such business for its customers with the knowledge and approval of its board of directors, charging commissions and interest and requiring its customers to fully protect the bank by the deposit of ample funds or securities for that purpose, and that such business was a fruitful source of revenue or profit to the bank, and such profits were received and disbursed among the stockholders, and the defendant had no knowledge of, or reason to suspect, the unfaithfulness or dishonesty of the cashier in his conduct of such transactions, then the defendant cannot and ought not be prejudiced in this case by the fact that the bank did such business, nor by the fact that he himself gave to the cashier orders for the purchase and sale of stocks on his own account, if he secured the bank amply with his own money or securities as other customers were required to do."

XV.

In the modification of defendant's 10th request for special instructions, by striking therefrom the word "truth," and inserting instead thereof the words in brackets, namely; "right conduct as respects the affairs of the bank," which said instruction, so modified, and showing the word stricken out in italics and the substituted words in brackets, was as follows:

"If you find from the proof that the defendant relied upon the statements and representations of the cashier as to the condition of the account of Dobbins & Dazy, and that he did so in good faith, believing those statements and representations to be true, and such statements were made at or so near the time of the certifications as to be fairly regarded as indicating the present state of the account, his certifications made in honest reliance upon them would not be criminal; and if the cashier was reputed to be, and believed by the defendant to be, a man of honesty and truth (right conduct as respects the affairs of the bank), the defendant would have the right to rely upon his statements in regard to that account."

XVI.

In the modification of defendant's 11th request for special instructions on same subject, by striking therefrom the words, "was despoiling the bank and using its funds," and inserting instead
21 thereof the words in brackets, namely; "had been using the funds and credits of the bank;" and by also striking therefrom the word, "dishonestly," and inserting instead thereof the words in brackets, namely; "unlawfully in respect to its affairs"—said

special instruction as so modified and showing the words stricken out in italics and those substituted in brackets, was as follows:

"The fact that the cashier had bought and sold stocks and bonds or cotton futures, and that defendant knew the fact, would not establish or imply that he was personally dishonest, nor deprive the defendant of the right to rely upon his statements in respect to the affairs of the bank, unless he also knew or had reason to believe that the cashier was despoiling the bank and using its funds (had been using the funds or credits of the bank), instead of his own in such transactions. In order to deprive the defendant of the right to rely upon the cashier it must be shown beyond a reasonable doubt that he knew that the cashier was unfaithful to the bank and acting dishonestly (unlawfully in respect to its affairs)."

It was error to admit the testimony relating to these two accounts over said objection of defendant. Said objection should have been sustained, and such testimony rejected.

XVIII.

In the refusal of defendant's 14th request for special instructions in reference to personal dealings in stocks by Porterfield and Spurr, which was as follows:

14. "The fact that the defendant, jointly with Frank Porterfield, bought railroad stocks through Latham, Alexander & Co., in their joint personal names and with their own means, is not evidence of the dishonesty of either; nor is the fact that they bought in the same way, similar stocks in the name of Porterfield individually, through Herzfeld & Co.; and if you believe that these accounts were mere personal transactions, not involving the bank in any way so far as the defendant was concerned, and he did not know of, or consent to, the use of the bank's funds by Porterfield in those transactions, he cannot be affected and ought not to be prejudiced by any such misuse of the bank's funds by Porterfield."

XIX.

In the exclusion of the evidence of John Overton and other witnesses, offered by defendant, first, as to defendant's good
22 character for truth and veracity; and secondly, as to defendant's good character for honesty and integrity during the whole period of his residence in Nashville—offered and excluded under the following circumstances:

After defendant had testified, and been cross-examined by plaintiff's counsel in the manner set forth in the record, defendant's counsel insisted that defendant had been attacked as a witness and his testimony impeached by the substance and manner of his cross-examination by counsel for plaintiff, which had shown a purpose to argue to the jury that he had not testified honestly and conscientiously, but had testified falsely (and counsel for plaintiff, subsequently, in argument before the jury, did argue and insist that defendant had not testified truthfully, and that his testimony was unreasonable and not worthy of belief); and offered testimony as

to his good character for truth and veracity, whereupon, during the examination of Mr. John Overton, and after said witness had answered preliminary questions touching his age and residence and to the effect that he had known defendant about thirty years, the following proceedings were had, to wit:

"Q. Do you know his general character and reputation in this community during that period for honesty and integrity and truth and veracity?

A. I do, sir.

Mr. BAXTER: The Government insists that the question ought to be divided. As to his reputation for honesty and integrity, it ought to be confined to the filing of the indictments, at least to the time of the charge in this case.

Mr. PITTS: If your honor please, we insist upon our right to put Major Spurr's character in issue, both for honesty and integrity and truth and veracity during the entire period that he has lived in Nashville up to the time of this investigation and subsequent thereto.

The COURT: The question now is, not your right to put the defendant's character in issue, but as to the time in which you can prove his general character. I have no doubt but he has the right to put his general character in issue, but the question now inquired into is as to the time of the limitations within which it can be done. The rule which allows the defendant to offer proof of his character, is based upon the presumption that a man who has a good character would not commit the offense with which he is charged, and of course, as the inquiry is in reference to a question of fact, whether he did do that thing or not, but I think the time to which the testimony should relate in
23 regard to his good character should also have reference to that time. Now there is a very important reason, counsel must see, if they reflect upon it, for limiting the inquiry to that time. If we were to bring the time down to the present, it would be liable to embarrass the jury and to turn their minds from the real merits of the case and put before them opinions which ought to be kept as far from the jury as possible. If we come down to the present we would proceed to launch ourselves upon an inquiry as to what the people of the community thought of the case at present and as to whether the defendant's reputation stood untarnished since this transaction or since his arrest. Now, I am quite clearly of the opinion that you are entitled to ask this witness questions showing the length of time of his acquaintance, his familiarity with the defendant and his means of knowledge of the general character which the defendant has sustained in the community up to the time of the transactions, then ask him what that character was, if the preceding question have shown he is sufficiently competent to testify on that subject. With respect to the other question in the case, that is, the respondent's character for truth and veracity, I am not satisfied that you have a right to go into that question generally unless his character has been attacked by the evidence on that subject.

Mr. PITTS: I would like to submit to your honor some authorities and be permitted to say something on that branch of the case.

The COURT: Very well, I will reserve that question if you think you can convince the court of the error of his ruling, but I will overrule in respect to the first one in regard to the defendant's character, that you are limited to the time when these transactions occurred.

Mr. PITTS: I think it is proper to state to your honor what I expect to prove by these witnesses.

The COURT: I understand what you expect to prove and I overrule that proposition.

Exception taken for the defendant.

Q. Now, Col. Overton, I understand you to say you had known his general character?

A. Yes, sir.

Q. What was that general character down to the time, as the court has limited me, to this charge against him?

A. I think it was good, sir.

Q. Now, do you know what his general character in this community, up to this time, has been for truth and veracity?

24 Objected to.

The question as to the admissibility of this evidence was argued by counsel, and the court stated that the evidence would only be permitted as to the character of the witness up to the time of the failure of the bank, and that after an examination of the question, the court would announce tomorrow whether or not the other part of the evidence offered would be admitted."

Other witnesses were then examined under the same ruling and limitation—counsel stating to the court that he wished to ask all of them as to the character of defendant for truth and veracity during their entire acquaintance with him down to the present time, also that he wished to ask them as to his character for honesty and integrity during the same period; and that he expected to prove by all the witnesses that his character was good in both respects.

The court upon statement of the district attorney that the Government admitted defendant's good character for honesty and integrity down to the period of the charge of the indictment, limited defendant to ten witnesses as to character; and that number was examined under the above ruling and limitation, embracing farmers, merchants, physicians, mechanics, and State and county officials.

On the morning succeeding the argument of the question, the court announced its adherence to the ruling above stated, grounding the same upon the fact that the plaintiff had introduced no evidence of defendant's bad character, and held, without deciding whether defendant had been impeached by cross-examination, that not having been impeached by evidence that his character was bad, he could offer no evidence of his good character as to truth and veracity.

The court in the charge to the jury, on the subject of defendant's testimony, said:

"Nevertheless, he (referring to defendant) testified that he did not know that Dobbins & Dazy's account was overdrawn when he certified these checks or any of them, or that there was a lack of funds in the bank to pay them, and that he had no reason for supposing this account to be overdrawn or that there was too small a sum to their credit to meet them.

Gentlemen, do you think this true? It is for you to say, and as you are responsible for the answer, I shall do no more than challenge your serious attention to the evidence in the case touching this question."

It was error to exclude the evidence offered as to the
25 good character of defendant for truth and veracity; and it was also error to limit the evidence of defendant's good character for honesty and integrity to the time of this charge against him, upon the objection, not of the defendant, but of the plaintiff.

XX.

In the action of the court in overruling defendant's motion for arrest of judgment for uncertainty and insufficiency of the verdict of the jury.

PITTS & MEEKS, *Attorneys.*

UNITED STATES, Plaintiff,
vs.
M. A. SPURR, Defendant.

Bill of Exceptions. Filed Feb'y 18, 1897. *H. M. Doak, Clerk.*

Be it remembered that upon the trial of this cause before Hon. H. F. Severens, beginning on March 30th, and ending with the verdict of the jury, on April 17, 1896, the following proceedings were had:

It was proven and not denied that the Commercial national bank was organized in 1884; that defendant M. A. Spurr was president and F. Porterfield, cashier, from its organization to its failure on March 25, 1893; that the original capital stock was $200,000, which was increased from time to time to $500,000; that its board of directors consisted of 21 members; that it had two standing committees, one known as the executive committee which was created and its duties prescribed by by-law No. 17, and the other known as the examining committee which was created and its duties prescribed by by-law No. 28; that the only by-laws of the bank relating to the duties and responsibilities of the president and cashier were by-laws No. 8 and 9. These several by-laws were read in evidence, together with No. 19, relating to the payment of checks, and are as follows:

"No. 8. The cashier of this bank shall be responsible for all of the moneys, funds and valuables of the bank and shall give bond with security to be approved by the board in the penal sum of $20,000, conditioned for the faithful and honest discharge of his

duties as such cashier, and that he will faithfully apply and
26 account for all such moneys, funds and valuables, and deliver the same to the order of the board of directors of this bank or to the person or persons authorized to receive them."

"No. 9. The president of this bank shall be responsible for all such sums of money and property of every kind as may be intrusted to his care or placed in his hands by the board of directors or by the cashier or otherwise come into his hands as president and shall give bond with security to be approved by the board in the penal sum of $5,000 conditioned for the faithful discharge of his duties as such president, and that he will faithfully and honestly apply and account for all sums of money and other property of this bank that may come into his hands as such president, and pay over and deliver the same to the order of the board of directors, or to any other person or persons authorized by the board to receive the same."

"No. 17. There shall be a committee to be known as the executive committee consisting of the president, five directors and the vice-president, who shall have the power to discount and purchase bills, notes and other evidences of debt and to buy and sell bills of exchange, and who shall at each regular meeting of the board of directors make a report of all bills, notes and other evidences of debt purchased by them for the bank since their last previous report."

"No. 19. No officer or clerk of this bank shall pay any check drawn upon it, or pay out money on any order unless the drawer of such check or order shall, at the time of the presentation thereof, have deposited in the bank funds sufficient to meet such check or order."

"No. 28. There shall be appointed by the board of directors a committee of three members thereof, whose duties it shall be to examine, four times a year, or oftener, the affairs of this bank, to count its cash, compare the assets with the accounts of the general ledger, to ascertain whether these accounts and all others are correctly kept and whether the condition of the bank corresponds therewith, and whether the bank is in sound and solvent condition, and recommend to the board such changes in the manner of doing business, etc., as shall seem to be desirable, the result of which examination shall be reported to the board at the next regular meeting thereafter."

The plaintiff introduced evidence tending to establish the charges in the several counts of the consolidated indictments based on the following-described checks of Dobbins & Dazy, on the Commercial national bank, viz:

27 1 dated Dec. 9, 1892, for $15,000.00.
1 dated Dec. 17, 1892, for 31,000.00.
1 dated Jan'y 3, 1892, for 40,000.00.
1 dated Feb. 13, 1892, for 9,641.95.

No evidence was offered in support of the accounts based upon the check of Feb'y 27, 1893, for $40,000, the court on a former trial having directed a verdict of not guilty as to that check, as admitted by counsel for both parties.

Plaintiff introduced (as collateral) evidence, tending to show that defendant certified two checks drawn by Dobbins & Dazy on said Commercial national bank, both dated Jan'y 24, 1893, one for $3,000 and the other for $11,724.89.

But the defendant was not indicted for the certification of either of said checks.

It was not denied by defendant that he marked "good" the above-mentioned checks and signed his name thereto as president, in the form stated in the indictments; but he denied that he did so with knowledge that Dobbins & Dazy did not at the time have sufficient moneys or funds on deposit in the bank to meet the checks.

Evidence was given that during the entire period covered by the dates of the above-mentioned six checks, the account of Dobbins & Dazy in the said bank was continuously and largely overdrawn upon the individual ledger, with the exception of one day in Jan'y, 1893, when there was a small credit balance; that the overdrafts or debit balances of each day were shown upon the individual ledger in red ink, and credit balances in black ink; that these overdrafts in the Dobbins & Dazy account varied largely in amount, running from $4,495.90 to $122,593.29, the account being a very active one; that on the several days upon which the above-mentioned checks were certified or marked good by the defendant the account of Dobbins & Dazy was overdrawn in the Commercial national bank on the individual ledger, and that they, the drawers of the checks, had no funds or moneys on deposit in the bank with which to meet the checks.

The state of the account of Dobbins & Dazy on the days of the said several certifications by defendant, and on preceding and succeeding days, as appeared by the individual ledger of the bank, were shown to be as follows:

Overdrawn at close of business, Dec. 8, 1892		$114,194 01
	Deposited Dec. 9, 1892	50,153 30
28	Checked out same day	377 26
	Overdrawn at close of business, same day	64,417 97
Deposited Dec. 10, 1892		13,972 00
Checked out same day		42,407 48
Overdrawn at close of business, same day		92,853 45
Overdrawn at close of business, Dec. 16, 1892		19,503 74
Deposited nothing, Dec. 17, 1892		
Checked out same day		31,568 91
Overdrawn at close of business, same day		51,072 65
Overdrawn at close of business, Jan. 2, 1893		77,515 59
Deposited Jan. 3, 1893		79,941 25
Checked out same day		40,551 50
Overdrawn at close of business, same day		38,125 84
Overdrawn at close of business, Jan. 23, 1893		62,153 37
Deposited Jan. 24, 1893		889 47
Checked out same day		22,982 50
Overdrawn at close of business, same day		84,256 46
Deposited Jan. 25, 1893		

Checked out, same day....	38,336 89
Overdrawn at close of business, same day...	122,593 29

Both of the checks dated Jan'y 24th, 1893, certified by defendant, were stamped paid, Jan'y 25th, 1893.

Overdrawn at close of business, Feb. 11, 1893.....	49,454 69

(Feb'y 12th was holiday.)

Deposited Feb'y 13, 1893.....	4,589 78
Checked out same day.	23,378 82
Overdrawn at close of business, same day...	68,243 73
Deposited Feb. 14, 1893.....	34,965 00
Checked out same day.....	39,641 95
Overdrawn at close of business, same day.	72,920 68

And that the check of Feb'y 13, 1893, certified by defendant, was paid on Feb'y 14, 1893, and there was evidence tending to show that it was certified by defendant on the latter date.

The items in detail, making up the above aggregates of deposits and checks on the days stated, were not shown.

There was evidence for the plaintiff tending to show, directly, that all the employés of the bank below the cashier had knowledge of the condition of the Dobbins & Dazy account, and of the fact that it was continuously and largely overdrawn during the period covered by the dates of the checks certified by defendant; but the
29 same testimony, on cross-examination, tended to show that none of these employés communicated this fact to the defendant or to any of the directors or committees of the bank or to the bank examiners.

The evidence chiefly relied on by the plaintiff to show knowledge of defendant of the state of the Dobbins & Dazy account at the dates of his certifications, was circumstantial—there being no direct testimony to that fact, except the testimony of F. Porterfield, to the effect that during the period between Nov. 25, 1892, and the failure of the bank he communicated the fact to defendant that the account of Dobbins & Dazy was continuously and largely overdrawn.

There was evidence for the plaintiff tending to show that defendant had access to the books of the bank, and was frequently among the clerks and book-keepers in the front part of the banking-house, where the books were kept, making inquiries concerning various matters and accounts from time to time—defendant's desk being in the director's room in the rear end of the banking-house; but on cross-examination the same testimony tended to show that the directors and committees of the bank and the bank examiners also had access to the books and were sometimes among the books and book-keepers in the front part of the banking-house, and that none of these persons discovered that the account of Dobbins & Dazy was overdrawn; also that defendant did not at any time make any inquiry of the book-keepers concerning that account, and that it was never referred to him by the directors or committees, nor his attention called to it by any of the clerks, book-keepers or employés of the bank.

The plaintiff also introduced evidence tending to show, as a circumstance indicating knowledge of the state of the Dobbins & Dazy account on the part of defendant, that the defendant and F. Porterfield were each engaged in speculations in cotton futures through Dobbins & Dazy, during the period covered by the dates of the checks certified by defendant and Porterfield, without furnishing any margins, and that the funds of the Commercial national bank were used by Dobbins & Dazy in such speculations with the knowledge of defendant. The evidence on this subject was conflicting, that on the part of defendant, both by cross-examination of plaintiff's witness and by witnesses introduced by defendant, tending to show that the alleged speculations by him through Dobbins & Dazy were fictitious—that no purchases or sales of cotton futures by Dobbins & Dazy for him had been authorized by him, and that none such had in fact been made by them for him; also that defendant did not know that Dobbins & Dazy were speculating in cotton futures, or that they or Porterfield were using the bank's funds in that way.

The plaintiff also offered and introduced (subject to exceptions by defendant as hereinafter fully shown) evidence tending to show, as a further circumstance indicating knowledge and intent on the part of defendant, that in 1886, and 1887 a large amount of the moneys and funds of the bank were used by Porterfield as cashier, with the knowledge of the defendant, and without the knowledge or consent of the bank, its directors or committees, to purchase on speculation stocks for the joint account of himself and defendant, and of other persons, in the name of the bank, or himself as cashier.

The plaintiff also offered and introduced (subject to exceptions by defendant as hereinafter fully shown), as further circumstances indicating knowledge and intent on the part of defendant, evidence bearing on two other accounts, one opened March 12, 1889, with Herzfeld & Co., of New York city, in the name of "Frank Porterfield, separate," and the other opened October 3, 1889, with Latham, Alexander & Co., also of New York city, in the name of "Porterfield & Spurr," both of which were continued down to the close of the bank in 1893.

The evidence on the part of the plaintiff tended to show that defendant and Porterfield were jointly interested in the speculations indicated by these accounts during the entire period of their existence; that numerous purchases and sales of stocks, bonds and cotton futures were made by them for their joint benefit on these accounts; and that large sums of the moneys and funds of the bank were used by Porterfield in such purchases, with the knowledge and assent of defendant.

The evidence for plaintiff did not tend to show that the funds used originally as margins on the opening of these accounts, were the funds of the bank and not the personal funds of Porterfield and Spurr; but it did tend to show that after the accounts were opened and had been running for some time, the funds of the bank were remitted to New York upon them by Porterfield, without securing or reimbursing the bank therefor. The evidence was conflicting

upon the questions whether defendant was jointly interested with Porterfield in all the transactions shown upon these accounts, whether he had knowledge or information of all of said transactions,
31 whether he was interested in, or had knowledge of, the continuation of the Herzfeld & Co. account after Sept., 1890, and whether he knew that Porterfield was using the funds of the bank in either account—the evidence on the part of the defendant tending to show the negative of all these questions.

There was further evidence on the part of defendant, both by cross-examination of plaintiff's witnesses and by witnesses called by defendant, tending to show, and from which the jury might have found, that at the organization of the Commercial national bank defendant had had no experience in the banking business; had not before been connected in any way with any bank; knew nothing of the details of such business; was not a book-keeper, and that he has never had any experience in book-keeping; but there was also evidence tending to show that as early as 1869, he was a member of the firm Prewett, Spurr & Co., at Nashville, a large lumber manufacturing concern, which was organized into a corporation in Dec., 1870, or Jan'y, 1871, when he became its secretary and treasurer, and afterwards, in 1884, its president, at a yearly salary of $3,000, which position he held during the entire existence of said bank, and that in 1886, in addition to being president of that corporation and of the bank, he was an active director and officer in a number of other corporations in Nashville, and that he was a very intelligent man and an exceedingly good business man; that Porterfield was experienced in the banking business; had spent most of his business life in banks; had filled every station from messenger to assistant cashier; was familiar with all the details of such business, including the keeping of books; was thoroughly competent for the position of cashier, and that down to the failure of the Commercial national bank his reputation for honesty, integrity and fidelity to the interests of the bank was of the very best, and he was trusted implicitly by the stockholders, directors and committees of the bank, and by the business public.

There was also evidence for defendant, both by cross-examination of plaintiff's witnesses and by witnesses called by defendant, tending to show, and from which the jury might have found, that at the organization of the bank, in view of the respective qualifications and experience of the president and cashier, it was understood and agreed by the board of directors that the cashier was to have immediate charge and supervision of the details, books, accounts and internal affairs of the bank, and that the president should
32 give his attention to working up custom and patronage and looking after such special matters as should be referred to him for his attention; that this understanding and arrangement continued down to the close of the bank; that defendant's time was chiefly occupied with outside duties, such as working up custom and patronage, securing influential men for places in the directory, corresponding with country banks and securing their accounts and entertaining their officials when visiting the city, securing the busi-

ness of new corporations which were being organized, often by becoming a stockholder and director or officer in them, and in settling, collecting or securing such bad and doubtful debts as were referred to him for that purpose by the directors or committees of the bank; also that the account of Dobbins & Dazy was never at any time referred to defendant, or placed in his charge, by any of the directors or committees of the bank; also that Porterfield, cashier, selected and employed, located and promoted or changed from place to place in the bank, all employés below assistant cashier (who was elected by the directors) and had immediate charge and supervision of them and of their work; also that there were nearly two thousand separate individual accounts on the individual ledgers, and that the book-keepers were constantly at work on these ledgers during the day when not engaged on the scratch books, pass books, etc.

The court, in the general charge, instructed the jury as follows:

"It was the defendant's duty, before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn. From the existence of such a duty you may draw an inference of fact that he did so inform himself, if he did not already know it. But the presumption is not an absolute one, and the defendant may show, if he can, that he did not, in fact, acquire information of the truth."

To which instruction the defendant then and there excepted.

Defendant requested the court to give the following special instruction, being the third of defendant's requests for special instructions:

"(3.) If you believe from the proof that at the organization of the bank, the cashier was a man of experience in the details of the banking business, and that the president was without experience or special knowledge of such matters; and if you further find that in view of these facts it was then understood and agreed by the board of directors that the cashier was to have immediate charge
33 and supervision of the details, books, accounts and internal affairs of the bank, and that the president was to give his attention to working up custom and patronage and looking after such special matters as should be referred to him for his attention, it will be proper for you to keep in mind these facts, together with the by-laws relating to those officers, in connection with the other proof in the case, bearing on the question whether the defendant had knowledge of the state of the account of Dobbins & Dazy at the time when he certified the checks of that firm, which are mentioned in the indictment, and give to them such weight as you think they are justly entitled to on the question whether or not the defendant did actually know of the state of that account at the time he certified said checks."

The court gave it, but modified it by the following addition:

"But these are part only of the facts which you should consider upon the question of the defendant's knowledge; and further, this instruction is to be taken with the other instruction that actual

knowledge is not necessary if the defendant purposely abstained from inquiry."

To which modification the defendant then and there excepted.

Defendant also requested the court to give the following special instruction on this subject, being the 4th of defendant's requests:

"If you believe from the proof that the management of the details and accounts of the bank was entrusted specially to the cashier and not to the president, and that the cashier was directed by the executive committee of the bank to look specially after the account of Dobbins & Dazy, and that it was not at any time referred to or placed in the hands or under the charge of the defendant nor his attention called to it, and that he was assigned to other duties, then no inference of the defendant's knowledge of the state and condition of that account should be drawn from the mere fact that that account appeared on the books of the bank to be overdrawn, for knowledge of the contents of the books cannot be imputed to the defendant simply because he was president or director."

Which instruction the court refused, and to which refusal the defendant then and there excepted.

Defendant also requested the court to give the following special instruction on same subject, being the 6th of defendant's requests:

"It is incumbent on the Government to prove to your
34 satisfaction beyond a reasonable doubt that at the time defendant certified the checks mentioned in the indictment he actually knew that Dobbins & Dazy did not have on deposit in the bank funds and credits sufficient in amount to cover the checks certified by him. It is not sufficient for the Government to show that it was the defendant's duty to know this fact and that he neglected it; nor that he could have known or ascertained the fact by inquiry of the clerks or by examination of the books; nor that he was careless or negligent or overconfident in the correct management of the account by the cashier; nor that he had the opportunity to know the fact and failed to avail himself of it; but it must appear by the proof beyond a reasonable doubt, that he did actually know at the time he certified the checks that sufficient funds were not on deposit to meet the checks and that he certified them wilfully and with such knowledge."

Which instruction the court also refused, endorsing upon the same that it was "declined except as given in other instructions;" to which refusal the defendant then and there excepted.

The following are the other portions of the general charge and special instructions granted, relating to this subject:

"The Government is bound in order to maintain any of the counts in these indictments to prove:

First. That the defendant certified the check.

Second. That the drawers of the check had not sufficient funds in the bank to meet such check.

Third. That the defendant knew that there were no funds of the drawer in the bank sufficient to meet them. This last element of the offence charged will be explained and its modifications stated further on.

Taking this evidence up in detail, it is not denied that the defendant certified these checks, and secondly that the account of the drawers was overdrawn when these certifications took place, but third, the defendant asserts that he was not cognizant of the fact that the account of the drawers was overdrawn at the time of his certification of the checks.

The knowledge of the defendant of the state of Dobbins & Dazy's account when he certified the checks is thus made the pivotal question in the case. Upon this question of knowledge the court charges you that it is not necessary for the Government to show that the defendant knew of the lack of funds of Dobbins & Dazy from an actual examination of the books at that time or from any inquiries made at that time. If the defendant knew that he had good reason for believing Dobbins & Dazy's account to be overdrawn and refrained from making such inquiry for the reason that he knew the condition of the account or because he was purposed to certify the check without reference to whether there were funds sufficient to meet it or not, that is sufficient. That is to say, if he shut his eyes to what he believed was the fact, and kept himself in ignorance of the state of the account because he believed an examination would disclose the facts, this would be equivalent to express knowledge. Nor is it necessary to prove that the defendant knew just what was the extent of the overdraft on Dobbins & Dazy's account or of the lack of funds to meet the checks. If he knew of the substance of the fact that Dobbins & Dazy had no funds there to meet their check and that there was no warrant for marking the check, Good, that was sufficient."

These three paragraphs were in the general charge, and preceded the clause first above quoted from the general charge in reference to defendant's duty to know the state of the account—the entire paragraph of the general charge embracing the clause first quoted being as follows:

"The checks before their certification were not obligations of the Commercial national bank; they were made such by the act of the defendant in certifying them to be good; by that act his bank was estopped to deny its obligation to the other banks which held them. It was the defendant's duty before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn. From the existence of such a duty you may draw an inference of fact that he did so inform himself, if he did not already know it. But the presumption of knowledge is not an absolute one and the defendant may show, if he can, that he did not, in fact, acquire information of the truth. And in general, if the defendant acted in good faith in making these certifications, believing that the state of the account of Dobbins & Dazy justified it, he is not guilty of the offense charged. Mere negligence or carelessness unaccompanied by bad faith would not render him guilty."

And in still subsequent portions of the charge, the following:

"In determining these questions you are to look to all the evidence bearing upon his knowledge and give all, its just effect. You are not restricted to the direct evidence of the facts, the moral prob-

abilities flowing from conceded facts, or which are proven to your satisfaction should also be considered and such probabilities
36 may furnish ground for believing that that which they indicate is the truth."

Also the 15th special instruction, asked by defendant and granted, as follows:

"(15.) The law presumes the defendant to be innocent, and this presumption stands as an all-sufficient witness in his favor until the Government establishes his guilt by competent proof to your satisfaction beyond a reasonable doubt."

And the 8th special instruction, asked by defendant and granted, with the addition by the court of the words in brackets, as follows:

"(8.) If the proof fails to satisfy to your minds clearly and beyond a reasonable doubt that the defendant did actually know at the time he certified the checks mentioned in the indictment that Dobbins & Dazy did not have on deposit in the bank sufficient funds and credits to meet the checks so certified, then you should acquit him, unless you are convinced by the proof beyond a reasonable doubt that he wilfully, designedly and in bad faith (these words mean substantially the same thing) shut his eyes to the fact and purposely refrained from the inquiry or investigation for the purpose of avoiding knowledge."

The word "wilfully" was not used in the charge of the court nor in any special instruction given, except in the portions above quoted.

But the court among other things instructed the jury as follows:

"If you believe from the proof that at the organization of the bank, the cashier was a man of experience in the details of the banking business, and that the president was without experience or special knowledge of such matters; and if you further find that, in view of these facts, it was then understood and agreed by the board of directors that the cashier was to have immediate charge and supervision of the details, books, accounts and internal affairs of the bank, and that the president was to give his attention to working up custom and patronage and looking after such special matters as should be referred to him for his attention, it will be proper for you to keep in mind these facts, together with the by-laws relating to those two officers, in connection with the other proof in the case, bearing on the question whether the defendant had knowledge of the state of the account of Dobbins & Dazy at the time when he certified the checks of that firm which are mentioned in the indictment, and give to them such weight as you think they are justly entitled to on the question whether or not the defendant did actually know of the state of that account at the time he certified said checks."

37 Also:

"If you find beyond a reasonable doubt, that the defendant did know of the unlawful use of the bank's funds by the cashier, as before indicated, that fact would not of itself establish the defendant's guilt in this case, but would only be a circumstance to be considered by you in connection with the other evidence on the question whether the defendant knew, or was charged with knowing

because he purposely abstained from knowledge, at the time of certifying the checks mentioned in the indictment, that Dobbins & Dazy did not have funds and credits on deposit in the bank sufficient to meet those checks."

The matter last quoted is a part of defendant's 12th request for instructions, elsewhere quoted in this bill of exceptions in full.

Also:

"And in general, if the defendant acted in good faith, in making these certifications believing that the state of the account of Dobbins & Dazy justified it, he is not guilty of the offense charged. Mere negligence or carelessness, unaccompanied by bad faith would not render him guilty."

The matter last quoted is a part of a paragraph of the charge, which paragraph is elsewhere herein copied in full.

Also: The 10th special instruction asked for by the defendant as follows:

"If you find from the proof that the defendant relied upon the statements and representations of the cashier as to the condition of the account of Dobbins & Dazy, and that he did so in good faith, believing those statements and representations to be true, and such statements were made at or so near the time of the certification as to be fairly regarded as indicating the present state of the account, his certification, made in honest reliance upon them, would not be criminal; and if the cashier was reputed to be, and believed by the defendant to be, a man of honesty and right conduct as respects the affairs of the bank, the defendant would have the right to rely upon his statements in regard to that account."

Also:

"The evidence as to what Porterfield said on the occasions to which those witnesses refer is not to be received as evidence of the facts which he may have then stated, but is only receivable and to be considered by you as evidence tending to touch the question of credit which you should give to his testimony. Whatever
38 credit his testimony delivered here may be entitled to, the question remains with you to settle upon all the evidence, whether the defendant Spurr, in certifying these checks, acted in good faith, and without any attempt to do that which the law forbids, and which he must be presumed to know was unlawful, namely: the certifying of the check as good, when the maker of it has no funds in the bank to meet it. If he acted in good faith, believing that the makers of the checks had funds in the bank to pay them, he should be acquitted."

Also: The following, being a part of defendant's fifth special request, elsewhere given in full in the bill of exceptions:

"If you find from the proof that the account of Dobbins & Dazy upon the books of the bank, was overdrawn continuously during the period covered by the dates of the checks certified by the defendant, and that the defendant was in fact ignorant of such overdraft; and that he certified the several checks mentioned in the indictment believing at the time that the exchange deposited by Dobbins & Dazy on the days upon which said checks were certified,

were sufficient, or more than sufficient to cover the amount of said checks, besides the overdrafts already existing, then he is not guilty, and you should acquit him, unless such ignorance of the overdrafts was wilful, as elsewhere explained in the court's instructions."

Defendant also requested the court to give the following special instruction, being the second of defendant's requests:

"(2.) Certain by-laws of this bank have been put in evidence before you, relating to the duties and responsibilities of the cashier and president, and these by-laws, being numbers 8 and 9, having been read and commented on in the argument, I instruct you that the former, relating to the duties and responsibilities of the cashier, means that he, the cashier, shall be responsible generally for all the moneys, funds and valuables of the bank, and requires him to faithfully apply and account for all its moneys, funds and valuables, and that he is primarily charged with the faithful keeping and accounting for the same. The latter, relating to the duties and responsibilities of the president, means that he is to be held responsible only for such sums of money and property of the bank as may be entrusted to his care or placed in his hands by the board of directors, or by the cashier, or which may otherwise come into his hands as president, and that he is to be responsible only for such sums of money and property as may be thus placed or come into his
39 hands, and is to faithfully and honestly apply and account for the same and otherwise faithfully discharge his duties as president. These two by-laws taken together, mean and imply that the cashier is primarily responsible for all the funds, property and valuables of the bank, and that the president is responsible only for such funds, property and valuables of the bank as may be placed in his hands or as may come into his hands as president, and that both these officers are each to faithfully and honestly discharge their respective duties."

The court gave this instruction, but modified it by the following addition:

"But I further charge you that the president is a general officer of the bank, and it is admitted that he had authority, notwithstanding these by-laws, to certify checks, and when the president assumed to certify these checks as good, the faithful and honest discharge of his duties required him to be informed of the condition of the account on which they were drawn."

And to this modification the defendant then and there excepted.

There was also evidence tending to show that during and prior to the period covered by the dates of the checks certified by the defendant, Geo. A. Dazy, in the name of his firm of Dobbins & Dazy was conducting a system of what is known among banks as "kiting," between Nashville and New York, and that his method of operation was as follows:

He would draw in the name of Dobbins & Dazy, large drafts on the New York correspondents of his firm, John Monroe & Co., and Latham, Alexander & Co., bankers and brokers, and deposit and discount these drafts without any bills of lading attached and take credit for the proceeds as cash, on the accounts of Dobbins & Dazy

in the two banks of Nashville, in which they carried regular accounts, namely, the First national bank and the Commercial national bank. Dobbins & Dazy, through said Dazy, would then draw their checks on these local banks against the proceeds of such New York drafts, which checks would be paid, and the New York drafts would be forwarded in the mail by the banks which had discounted them, to New York for collection. The time required for the drafts to reach New York by mail and be presented for payment was known.

Dobbins & Dazy having no funds in the hands of the drawees
40 of these drafts to meet them when drawn, in order to provide funds in New York to meet them when presented, Dazy would again, on the day it was calculated the drafts would be presented for payment, draw another set of drafts in the name of his firm on the same drawees, discount and take credit for them in the First national bank and Commercial national bank, of Nashville, as before, draw checks against such proceeds in favor of some local bank in which Dobbins & Dazy did not carry an account—generally the Fourth national bank, but sometimes the American national bank—and by means of these checks have the amount necessary to meet their maturing drafts in New York transmitted by wire to the drawees, John Monroe & Co., or Latham, Alexander & Co., as the case might be, so that the drawees might pay the first set of drafts when presented. When the second set of drafts were about to reach New York and be presented, provision for their payment would be made in the same way; that is, by means of a third set of New York drafts used as a basis for checks, upon which money would be again transmitted by wire to New York as before; and so on, the proceeds of succeeding drafts being used to take up the preceding ones and the volume of such transactions continually increasing.

When each of said drafts was drawn upon John Monroe & Co. and Latham, Alexander & Co., Dobbins & Dazy, according to their own books, were largely overdrawn with the drawees, but their was no evidence as to how their accounts stood on the books of the drawees. There was also evidence tending to show that certain officers of the First national bank were speculating in cotton through Dobbins & Dazy, during the period in which that bank was accepting the unsecured drafts of Dobbins & Dazy as cash, and was certifying Dobbins & Dazy's checks to carry out said kiting transactions.

There was also evidence on this subject tending to show that these transmissions of money to New York for Dobbins & Dazy by the Fourth national bank and the American national bank were made by means of cipher telegrams, addressed to their bank correspondents at New York, directing them to place so much money with John Monroe & Co. or Latham, Alexander & Co., as the case might be, for the credit of Dobbins & Dazy; that these cipher telegrams were understood only by the sending and receiving banks, and were meaningless to all other persons; and that the fact that such transmissions were being made, or that this system of "kiting" was going on, was a secret at Nashville, and was known only to G. A.
41 Dazy and his clerks, and to the banks making the transmissions and to F. Porterfield.

There was evidence by Porterfield tending to show that during the period from November 25th, 1892, to the failure of the Commercial national bank, Porterfield told the defendant that Dobbins & Dazy were transmitting large sums of money to New York by telegram.

The evidence further tended to show that the amount thus transmitted to New York for Dobbins & Dazy by the Fourth national bank, from Sept. 6, 1892, when such transmissions began, to March 1, 1893, when they closed, was $1,829,427.25, on checks drawn by Dobbins & Dazy upon the Commercial national bank, and $1,633,524.25 on checks drawn by Dobbins & Dazy on the First national bank; and that at the failure of the Commercial national bank on March 25, 1893, it had on hand drafts amounting to $142,000, which had been drawn by Dobbins & Dazy on New York and discounted and credited to them by the Commercial national bank, on Feb'y 27, 1893, and which had been protested for nonpayment on March 1, 1893, and have never been paid.

There was also read in evidence a written contract of partnership between F. Porterfield, G. A. Dazy and W. J. Wood, which was as follows:

"This contract, made and entered into by and between George A. Dazy, Frank Porterfield and William J. Wood, all of the city of Nashville, county of Davidson and State of Tennessee;

Witnesseth:

That whereas, said parties have this day formed a partnership to be known by the firm name of Dazy & Company, for the purpose of gathering information in regard to the growing crop of cotton and making such trades or deals as the result of this information as said parties may agree to; now, therefore, the premises considered, the said parties expressly promise and agree to and with each other as follows:

I.

The profits and expenses of the partnership to be shared and borne equally by each of the said parties.

II.

Said firm having employed an agent, or agents, to collect and state the facts with reference to the cotton crop of 1892–1893, it is expressly agreed that the information coming to said firm
42 from said agent or otherwise shall not be given to any other person whomsoever, nor published until each of the members of said firm have given their assent to its communication or publication.

III.

Said parties expressly bind themselves to the utmost caution in this regard, it being well understood by each one of them that the only hope of success in this undertaking is to keep closely to themselves for the benefit of this firm only, the information they may obtain.

IV.

It is agreed that said parties shall meet as often as practicable and determine just what purchases and sales shall be made, and at these meetings a majority of the three partners shall determine upon the purchases or sales to be made.

V.

It is further agreed and stipulated that the information shall be kept in such way as to always be open to each of the three members of the firm, but to no other person, whomsoever, unless it shall be necessary to employ some person or agent to collect and tabulate the information coming to said firm.

The term of this partnership is to commence at once and to continue for three years, but it may be dissolved at any time by the wish and consent of one member of said firm.

In witness whereof, the said parties have signed this agreement in triplicate, this the fifth day of May, 1892.

GEORGE A. DAZY.
W. J. WOOD.
FRANK PORTERFIELD."

Witness:
SAM KIRKMAN.

There was evidence on the part of the plaintiff tending to show that defendant had knowledge or information of the existence of this contract some time after it was made; but there was also evidence on the part of the defendant tending to show, and from which the jury might have found, that defendant had no knowledge or information of such contract until after the failure of the Commercial national bank.

43 The evidence further tended to show that there were large speculations in cotton futures by the parties to said contract during the summer and fall of 1892; that after the failure of the Commercial national bank, F. Porterfield and Geo. A. Dazy were jointly indicted in this court for conspiracy to fraudulently abstract and misapply the moneys and funds of said bank in speculations in cotton futures; that Dazy had been tried and convicted upon said indictment, and had served out his sentence in the penitentiary; and that Porterfield had been tried and convicted upon another indictment for fraudulent abstraction and misapplication of the funds of said bank, and is now serving his sentence in the penitentiary.

There was evidence tending to show that the firm of Dobbins & Dazy made application to the executive committee of the Commercial national bank (which met each day at the bank), in September or October, 1891, to place part of its account with that bank, and to have a line of credit allowed it of $30,000—a line of credit being the privilege of borrowing the sum specified upon its own notes without security; that the matter was under discussion by the committee for several days, and on or about October 10, 1891, the account was taken and the said line of credit allowed; that at that time, and

down to the 23rd of March, 1893, the firm of Dobbins & Dazy was reputed to be very wealthy, and to be doing a very large and prosperous business in the purchase and sale and exportation of cotton; that its financial standing and credit were of the very best; that the worth of the firm was rated in commercial circles and by the standard commercial agencies at from $300,000 to $500,000 (although the plaintiff's evidence tended to show that their assets consisted only of money, choses in action and cotton on hand and in transit, and that they never raised money in bank on drafts without bills of lading attached, except on the drafts used during said kiting transaction); that the character and reputation of its members, personally, for honesty, integrity and truthfulness were first class; that the parent house of the firm was at Nashville, Tennessee, and was under the immediate charge of George A. Dazy, a member of the firm; that a branch house at New Orleans was under charge of J. P. Dobbins, the other member, and the firm had numerous branch houses and purchasing agencies located at numerous cities in the cotton-producing sections of the South, where cotton
44 was purchased in large quantities for shipment to New York and other eastern points, and for exportation to Europe.

Also that at the time Dobbins & Dazy placed their account with the Commercial national bank in October, 1891, it was understood by the executive committee and by the defendant, who was a member of that committee, that their business was one of great magnitude, in amount, and that their course of business was, to purchase cotton through their branch houses and agents at various points in the South, these branch houses and agents shipping the cotton to the correspondents of the firm in the East and drawing on the parent house at Nashville for the price of the cotton so purchased, attaching the bills of lading to the drafts so drawn; that the parent house, to meet these drafts so drawn upon it, would draw its drafts upon its correspondents in the East, the consignees of the cotton, attaching to them the same bills of lading, then deposit and discount these eastern drafts in its local banks at Nashville, and draw its checks against the proceeds, in payment of the drafts drawn upon itself by its branch houses and agents; that it was understood at the time the account was accepted by the committee that the deposits of the firm would be chiefly in eastern drafts, and not in money; and that the bank would be expected to provide cash funds with which to meet the checks drawn by the firm against the proceeds of such eastern drafts, which, it was understood, would be secured by bills of lading for cotton; that on account of this course of business and its magnitude, as understood by the committee, and the apprehension that the bank might not always be able to provide sufficient cash funds without inconvenience, to carry the account, there were objections by two members of the committee to the taking of the account, and it was these objections that occasioned the prolonged discussion of the matter in the committee; that defendant, Spurr, was one of the objecting members, and the ground of his objection was that just stated; that the other objecting member was Major R. H. Dudly, who objected on the same ground as defendant, Spurr,

and also on the ground that, having been in the cotton business himself, he believed they would be likely to overdraw their account; that when the account was finally taken, the cashier was directed by the committee, in defendant's presence, not to allow them to overdraw their account, nor to borrow more than their line of credit, and not to discount their drafts without bills of lading attached, and he promised to comply with their direction; that the
45 cashier was thereafter several times asked by Major Dudly about the account, and he always replied, down to the close of the bank, that it was satisfactory and a very profitable account; that the members of said committee understood and believed that Porterfield was performing his promise to the committee and obeying the instructions which the committee had given him in regard to the account and drafts of Dobbins & Dazy, and that there was never any circumstance brought to the knowledge of the committee indicating that there was anything wrong with the account of Dobbins & Dazy, or suggesting the propriety of an investigation of that account; the members of both the executive and examining committees and all the directors of the bank who were examined upon the subject, testified that they did not know or have any intimation at any time before the failure of Dobbins & Dazy on March 23, 1893; that their account was overdrawn in the bank, or that they were depositing and discounting, or had deposited and discounted, any eastern drafts without bills of lading attached; and there was evidence tending to show that said committeemen and directors did not regard it as any part of their duty to examine the accounts of depositors on the ledger, nor the drafts deposited by the customers of the bank.

There was also evidence tending to show that Porterfield misrepresented the real state of the Dobbins & Dazy account to the defendant and the committees and the directors of the bank, by statements made to them, and also in his sworn reports to the Comptroller of the Currency, wherein the overdrafts in the bank were very largely understated.

There was also evidence for defendant tending to show, and from which the jury might have found, that the defendant also understood at the time the account of Dobbins & Dazy was taken by the bank and thereafter until the 9th of March, 1893, that the course of business of the firm was to be and was as above stated; that he did not receive or handle any of the New York drafts deposited by the firm, and had nothing to do with the discounting of them, nor with the keeping of their account on the books; that he did not understand that such matters were within the line of his duties, but were entrusted to the cashier and the teller and the book-keepers under him; that he had no knowledge or intimation that Dobbins & Dazy had been discounting their drafts without bills of lading attached until the 9th of March, 1893, when he first learned through
46 Mr. Porterfield of the protest of the drafts drawn by them on John Monroe & Co. of New York for $142,000, drawn Feb'y 27, and protested March 1, 1893; that he understood and believed, up to that time, that all eastern drafts discounted by the bank for

the firm were secured by bills of lading, as the cashier had promised the committee they should be; and that he had no knowledge or intimation of the kiting arrangement of Dobbins & Dazy through telegraphic transmissions, of money to New York by the Fourth and American National Banks of Nashville, as disclosed in this cause, until after the failure of the Commercial national bank.

There was also evidence for defendant tending to show, and from which the jury might have found, that he had no knowledge of the fact that the account of Dobbins & Dazy was overdrawn on the books of the bank at the time of the certification of any of the checks upon which he is indicted, nor at any time during the period covered by the dates of the checks; that he did learn at one time, in the early part of the account, that it had been overdrawn, but learned at the same time that the overdraft had been made good; that this information was given him by the cashier in response to an inquiry made of him soon after the account was opened as to how it was progressing.

Defendant testified that he remembered the circumstances attending the certification of the check of Dec. 17, 1892, mentioned in the indictment and that he was enabled to locate and remember these facts by the fact that he had been absent from the city, and had just returned to the bank that day, when a messenger of the Fourth national bank handed him the check; that while he held it in his hand, the cashier came in, and he asked the cashier whether the check was good, and he replied that it was good, and for much more—whereupon he marked it good, and handed it back to the messenger, understanding and believing from the cashier's statement that there were funds and credits of Dobbins & Dazy in the bank more than sufficient to cover the check. As to the other checks mentioned in the indictments, defendant testified that he remembered in a general way certifying them, but could not locate the dates or amounts, nor could he remember any of the circumstances attending their certification, but was positive that he inquired in every instance, either of the cashier or of the exchange clerk, who kept the account of New York exchange or New York drafts deposited, and in every instance received information
47 that sufficient funds and credits of Dobbins & Dazy were then in the bank to cover the check certified, and that he never did at any time certify a check without receiving such information, and that he relied upon it as true; that if the cashier was in, he inquired of him, if not, he inquired of the exchange clerk; and there was other evidence besides the testimony of defendant tending to show the defendant sometimes inquired of the exchange clerk for the amount of New York exchange or drafts deposited by Dobbins & Dazy, and that he gave the information—his desk being near that of the cashier, and in the rear portion of the building, near the directors' room, where the president's desk was.

There was also evidence tending to show, and from which the jury might have found, that on the day the evidence tended to show that each of the checks mentioned in the indictment, except that of December 17, 1892, was certified by the defendant, there was de-

posited in the bank by Dobbins & Dazy, in New York exchange or drafts, a sum more than sufficient to cover the check certified on that day, although not sufficient to cover both the check and the overdraft then existing on the books of the bank, as shown by the individual ledger on the morning of that day.

There was also evidence tending to show that there was not enough deposited on Jan'y 24, 1893, to cover the two checks of Dobbins & Dazy, dated that day, which were certified by the defendant.

There was also evidence tending to show that in the course of carrying the account of Dobbins & Dazy by the Commercial national bank it frequently became necessary for the bank to sell New York exchange to other banks of the city, in order to provide itself with necessary funds to meet the checks drawn upon it by Dobbins & Dazy, and the demands for money of its other customers; and that on this account the cashier gave instructions to the tellers and clerks to report back to him the deposits of Dobbins & Dazy as they were made, and also to send back to him the checks drawn by them on the bank, when presented, in order as his testimony tended to show that he might be constantly informed of the condition of the account and be enabled to arrange for the sale of exchange, if necessary, to meet balances due the other banks of the city at their daily settlements.

There was also evidence tending to show that there was no clearing-house at Nashville; and that the banks of the city for
48 their convenience in making settlements with each other, had adopted the following custom or plan for accomplishing such settlements:

The hour of 11 o'clock a. m. each business day was fixed as the exchange or settlement hour. At that hour each bank of the city sent to every other bank a list of items then held by the former against the latter, and received from the latter a similar list of items held by the latter against the former; and from these lists the balance was ascertained, and only this balance was required to be paid. This balance, however, was not required to be paid at 11 o'clock, the exchange hour, but might be paid at any time before the close of the banks, at 2 o'clock p. m. Items received after 11 o'clock were held over and included in the exchange and settlement of the next day. Lists of these latter items were usually exchanged by the banks at 8 o'clock a. m. of the next day, before the opening hour, which was 9 o'clock, and their footings entered into and formed part of the regular exchange and settlement at 11 o'clock; that it was not the custom of the Nashville banks, during the time to which the facts of this case relate, to present to each other for payment the separate checks as they were received during the day, but all the checks were held and embraced in bulk in the general exchanges and settlements between the banks as above set forth; but it was customary, when a large check was received by a bank, drawn upon another bank of the city to send it by a messenger before cashing it or remitting money on account of it, to the drawee bank to know whether it was good and would be recognized and paid at the next

exchange or settlement hour; and if it was good, some officer of the drawee bank would mark it good and return it by the messenger.

There was also evidence tending to show that when the Fourth national bank began to telegraph money to New York for Dobbins & Dazy in the fall of 1892, upon their checks certified by the Commercial national bank, the Fourth national bank occasionally carried the checks over to the following day; that is, that when they came in after 11 o'clock they would be carried over and paid the next day; but that later on this was changed and the Fourth national bank required that the checks be paid the same day and before the money was telegraphed to New York.

There was also evidence, undisputed, that none of the said four checks of Dobbins & Dazy marked good by defendant, were so marked by him for or at the request of Dobbins & Dazy, or any messenger or agent of that firm, but that they were all pre-
49 sented by a messenger of the Fourth national bank, and marked good at his instance to indicate that they would be recognized and paid at the next exchange or settlement hour.

There was also evidence on the part of the defendant tending to show, and from which the jury might have found the following custom and practice of the Commercial national bank in reference to certifying checks and marking checks "Good":

That the bank kept on the teller's desk a certification stamp containing the word "Certified" and the date, with a blank space left for the signature of the certifying officer; that a check certified for a depositor of the bank, presumably for the purpose of being sent off by mail or going into circulation, was stamped with the certification stamp by the teller, who wrote his name in the blank space, and then made out for the book-keepers a charge ticket directing a charge to the customer's account of the amount of the check, and a credit ticket directing the same amount to be credited on the account of "certified checks," on the general ledger; that when the check was afterwards returned and presented and paid by the bank, it was charged to account of "certified checks," thus balancing the account with respect to that item; that this custom was always pursued with checks certified for depositors and returned to them; and that on the other hand, where a check was presented by an associate bank of the city, simply with a view of ascertaining whether it would be recognized and paid in the next exchange and settlement between the holding and drawee banks, and with no view of going into circulation, it was simply marked "Good" or "O K" by the teller, the cashier, assistant cashier or president—to whomsoever of these officers it might be presented; and that in such case, the certification stamp was not used, no charge or credit tickets were made and no notice was taken of such check on the account of "certified checks," nor on the drawer's account, until the check came in regularly through the bank exchange and settlement.

There was testimony tending to show that where a check was presented to the teller, and he knew that the drawer had the money to his credit in the bank the custom was for the teller to certify the check without referring it back to the cashier or any one else. There

was no testimony that any of the checks certified by defendant were ever presented to the teller.

The court, in the general charge, gave the following instruction:

"The Government is bound, in order to maintain any of
50 the counts in these indictments, to prove:

First. That the defendant certified the check.

Second. That the drawers of the check had not sufficient funds in the bank to meet such check.

Third. That the defendant knew that there were no funds of the drawer in the bank sufficient to meet them. This last element of the offense charged will be explained and its modification stated further on."

To which instruction the defendant then and there excepted.

The subsequent explanation and modification of the third element of the offense, referred to above, was as follows:

"The knowledge of the defendant of the state of Dobbins & Dazy's account when he certified the checks is thus made the pivotal question in the case. Upon this question of knowledge the court charges you that it is not necessary for the Government to show that the defendant knew of the lack of funds of Dobbins & Dazy from an actual examination of the books at that time or from any inquiries made at that time. If the defendant knew that he had good reason for believing Dobbins & Dazy's account to be overdrawn and refrained from making such inquiry for the reason that he knew the condition of the account or because he was purposed to certify the check without reference to whether there were funds sufficient to meet it or not, that is sufficient. That is to say, if he shut his eyes to what he believed was the fact, and kept himself in ignorance of the state of the account because he believed an examination would disclose the facts, this would be equivalent to express knowledge. Nor is it necessary to prove that the defendant knew just what was the extent of the overdraft on Dobbins & Dazy's account or of the lack of funds to meet the checks. If he knew of the substance of the fact that Dobbins & Dazy had no funds there to meet their check and that there was no warrant for marking the check 'Good,' that was sufficient."

Defendant requested the court to give the following special instruction, being the 5th of defendant's requests:

"5. If you find from the proof that the account of Dobbins & Dazy upon the books of the bank was overdrawn continuously during the period covered by the checks certified by the defendant, and that the defendant was in fact ignorant of such overdraft; and that he certified the several checks mentioned in the indictment, believing at the time that the exchange deposited by Dobbins &
51 Dazy on the days upon which said checks were certified was sufficient to cover the amount of said checks, then he is not guilty and you should acquit him."

Which instruction the court declined to give in its original form, but modified it by adding certain words, and gave it as thus modified; the added words appearing in brackets, as follows:

"5. If you find from the proof that the account of Dobbins &

Dazy upon the books of the bank was overdrawn continuously during the period covered by the checks certified by the defendant, and that the defendant was in fact ignorant of such overdraft; and that he certified the several checks mentioned in the indictment, believing at the time that the exchange deposited by Dobbins & Dazy on the days upon which said checks were certified was sufficient to cover the amount of said checks (besides the overdraft then existing), then he is not guilty and you should acquit him (unless such ignorance of the overdraft was wilful as elsewhere explained in the court's instructions)."

To the modification by adding the words "besides the overdraft then existing," the defendant then and there excepted.

Defendant also requested the court to give the following special instruction, being the 7th of defendant's requests:

"7. If you find from the proof that the defendant believed and understood, at the time the account of Dobbins & Dazy was taken and during the existence at the Commercial national bank, that they were engaged in the purchase of cotton and its shipment to New York and other eastern points; that they had numerous branch offices and agents in various States of the South, where the cotton was purchased; that the Nashville office was the parent office of the firm, upon which drafts were drawn by the branches and agents at other points for the payment of the cotton so purchased, accompanied with bills of lading; that the payment of these drafts drawn upon the parent house required large amounts of money; that to provide such funds, the parent house expected to deposit, and that they were depositing, to their credit in the Commercial national bank, drafts on their correspondents in New York secured by bills of lading for cotton, and then drawing their checks on the Commercial national bank against such deposits; and that their deposits were expected to consist and did consist, mainly of such New York drafts. If you believe from the proof that the defendant understood and believed that this course of business was to
52 be, and was in fact being pursued by Dobbins & Dazy, at Nashville, and that the volume of such business would be large, and likely to require the sale of exchange by the bank in order to keep supplied in cash funds, and the defendant had no knowledge at the time he certified the checks mentioned in the indictment that Dobbins & Dazy, instead of conducting a legitimate business in this way, were wiring money to New York through another bank in order to sustain the system of kiting as developed by the proof on the trial, and that having no knowledge of the overdraft of Dobbins & Dazy's account in the bank, the defendant had in mind the course of business as he understood it to be, and supposed and believed they were making such daily deposits of New York exchange and then drawing against them, and that in each instance where he certified a check he had information from the cashier or exchange clerk upon which he relied in good faith that a sufficient amount had been deposited that day and was in the bank, to cover the check certified, he would not be guilty under the indictment, and you should acquit him."

The court declined to give this instruction, endorsing thereon, "Declined. The main part of this request is a recital of part of the evidence only, and is argumentative. The latter part is correct and is given." The court gave the latter part of this instruction, after modifying it, as follows—the words added by the court being inclosed in brackets:

"(If you find) that in each instance where he certified a check the defendant had information from the cashier or exchange clerk, upon which he relied in good faith, that a sufficient amount had been deposited that day and was in the bank, to cover the check certified (I add: in addition to the existing overdraft), he would not be guilty under the indictment and you should acquit him."

To the refusal of the 7th special instruction, and to the instruction given as a modified portion thereof, the defendant then and there excepted.

Defendant also requested the court to give the following special instruction, being the defendant's 9th request:

"9. The defendant's want of knowledge of the state of the account of Dobbins & Dazy at the time he certified the checks will be a complete defense to him unless you are satisfied beyond a reasonable doubt that such want of knowledge proceeded from a will to disobey the law, or from an indifference to its commands."

The court refused this instruction, endorsing on it, "Declined as liable to mislead as to the character of the purpose," and to which refusal the defendant then and there excepted.

53 After the jury were charged and had retired from the court-room to consider their verdict, and had been deliberating for some hours, they returned to the court-room and asked the following question, which was written out in pencil and handed to the court:

"We want the law as to the certification of checks when no money appeared to the credit of the drawer.

The court then said: The jury state that they want the law as to the certification of a check where there is no money to the credit of the drawer.

I cannot better answer this question which the jury has put to the court, than by reading the section of the Revised Statutes which relates to that subject.

(Reads from sec. 5208, R. S.:) It shall be unlawful for any officer, clerk or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check.

Does this answer your question?

FOREMAN OF THE JURY: Yes, sir.

THE COURT: I read it again so that you may all understand it. (The court reads again that part of section 5208 R. S. quoted above, and added:)

Is that all, gentlemen? The $30,000 was the credit allowed, and these overdrafts, as the court understands from the testimony in the

case, were in excess of that. The account of Dobbins & Dazy—the overdrafts—were in excess of the amount which Dobbins & Dazy had as a limit of line of credit.

I charge you in addition to the instructions I gave you this morning, that a check drawn upon a bank, where the drawer has no funds, creates no obligation against the bank, and it does not create any obligation until it is certified as good by an officer of the bank, and that makes the check good as to the holder of it, and the bank then becomes estopped, although there was no warrant for the drawing of the check, as against the *bona fide* holder. So that, the obligation of the bank to meet it in such case is made so by the act of the officer who certifies it to be good. That is what is meant by false certification. It is the certifying by an officer of a bank that a check is good when there *is* no funds there to meet it.

You understand what I have said now is to be taken in connection with what I have before instructed you."

As the jury were retiring, counsel for defendant said to the
54 court that he thought what the jury wanted was the act of 1882 making it a misdemeanor to wilfully violate the section of the Revised Statutes which the court had read to them, and that the court ought to read and explain that act to the jury; the court asked if counsel referred to the act prescribing the penalty for false certification, and on being answered in the affirmative, stated that the jury had nothing to do with that.

To this action of the court in reading twice section 5208 of the Revised Statutes and in failing to read and explain the act of 1882, in response to the jury's question, and to the additional instructions given to the jury at this time beginning with the words "The $30,000" and ending with the words "to meet it," the defendant then and there excepted.

In the opening statement of counsel for the Government to the jury as to the facts and what the Government expected to prove as evidence that defendant Spurr certified the checks of Dobbins & Dazy wilfully or with bad intent to injure the bank, he stated as follows:

"13th. As further evidence that Spurr certified the checks of Dobbins & Dazy, wilfully or with bad intent to injure said bank, the Government expects to prove that in December, 1886, De Neufville & Co. were stock brokers in New York, and that Porterfield sent them $25,000 of the moneys of the Commercial national bank to be used by them as margins for buying certain stocks on speculation for Porterfield, Spurr and others.

Afterwards the account was transferred from De Neufville & Co. to Latham, Alexander & Co., who were bankers and brokers in New York.

On May the 14th, 1887, certain of said speculative stocks was sold by Latham, Alexander & Co., at a loss of $9,762.35; one-third of which ($3,254.12) was admitted by the defendant to be due from him. As he did not have money enough in the bank to make good his share of said loss, he made his note of May 12, 1887, for the amount; which note has been renewed from time to time, and the last re-

newal note which is for $5,500 is now in the hands of the bank's receiver, and the principal thereof is wholly unpaid.

Another third of said loss ($3,254.12) was admitted by Porterfield to be due from him. As he did not have money enough in the bank to make good his share of said loss, he made his note of May 21, 1887, for $5,796.39 to cover his share of said loss and also another loss sustained by him on other speculations made through Latham, Alexander & Co."

And thereafter on the trial, and before the Government rested, and as part of its case-in-chief, and during the direct examination of Mr. Chas. Fraser, of the firm of Latham, Alexander & Co., of New York, counsel for the Government offered proof of certain purchases and sales of stocks on the New York stock exchange, through De Neufville & Co., and Latham, Alexander & Co., all of New York, in the name of F. Porterfield, cashier (of the Commercial national bank) for the account of sundry customers of said bank, including F. Porterfield, R. S. Cowan, who was at the time assistant cashier, and the defendant, in 1886 and 1887. There had been proof, before this offer of evidence of specific transactions, tending to show that the Commercial national bank had been, since soon after its organization, acting as agent for its customers in making purchases and sales of stocks and bonds on New York exchange, charging commission for its services, and requiring customers for whom such purchases and sales were made to fully protect it by depositing sufficient cash or collateral securities or making notes; that this was known to and approved by the directors, and that the income from commissions on such purchases and sales was large and greatly swelled the general profits of the bank.

Defendant's counsel objected to the evidence offered of specific transactions of stocks and bonds, and to all evidence which might be offered of that character. The grounds of objection urged in argument were:

First. Its irrelevancy to the charges of the indictment.

Second. The remoteness in time of such transactions from the transactions involved in the charges of the indictment.

Third. The want of any connection between such transactions and those involved in the charges of the indictment.

Fourth. That such transactions were not shown to be fraudulent; nor if so, that defendant had any knowledge of the fraud; and that they were neither similar nor contemporaneous transactions to the charges of the indictment, and their admission would tend to multiply the issues, and to confuse the jury and prejudice the defendant.

The jury retired from the court-room and the question of the admissibility of this line and character of evidence was argued
56 before the court; whereupon the jury having returned, the court announced its ruling upon the objection as follows:

By the COURT: "I will then announce the conclusion reached by the court upon the question whether the proof proposed would be admissible for the purpose of affecting the question of intent by proving similar contemporaneous or near transactions. I greatly doubt

whether it would be admissible, on the ground of remoteness of time, but I am inclined to think it admissible as affecting the question of the respondent's right to rely on the representations made by Mr. Porterfield, or upon his assumed correctness of action and honesty of purpose. I do not think it is expedient to go any more extensively into the grounds of the ruling; the jury being present, I purposely abstain from any discussion of the facts. It seems only to remain to say that the ruling of the court must necessarily be based upon the offer to prove it as a whole and the court must assume that the proposition is made in good faith and it is only upon that assumption that such proof can be made, and cannot be controverted. I think it bears in a sense upon the question of the right of Spurr to rely upon Porterfield's representation upon the question of fact, whether he did rely upon any assumed correctness, or honesty of action."

To which ruling the defendant then and there excepted, and it was agreed and understood that all subsequent testimony relating to collateral transactions of purchases and sales of stocks, &c., should be treated as subject to the same objection and exception without repeating same at each offer.

Thereupon, Mr. Chas. Fraser being recalled, he and other witnesses, subject to said objection and exception, testified on this subject, their testimony tending to show by memoranda, charge and credit tickets, deposit slips, pencil statements and calculations, all in the handwriting of F. Porterfield, and by accounts and statements from the books of New York bankers and brokers, the following purchases and sales of stocks for the Commercial national bank made with the funds of said bank remitted to New York by said Porterfield, for account of defendant and the other persons named, with the result stated, namely:

November 12, 1886, 200 shares Hocking Valley stock, sold through Kohn, Popper & Co. Net profit $424.46 credited on books of the bank one-half to F. Porterfield and one-half to M. A. Spurr. Commissions of $50 retained by the bank and credited to "exchange account."

57 November 26, 1886, 100 American cotton oil certificates, sold through Kohn, Popper & Co. Net profit $980.58 credited one-half to F. Porterfield and one-half to M. A. Spurr. Commissions $25 and interest $7.98 retained by the bank.

November 26, 1886, 100 shares Louisville & Nashville R. R. stock, sold through Kohn, Popper & Co. Net profit $290.92 credited one-half to F. Porterfield and one-half to M. A. Spurr. Commission $25 and interest $8.52 retained by the bank.

December 16, 1886, 200 shares Tenn., Coal I. R. R., stock sold through De Neufville & Co. (Net profit $2,933.18 credited one-half to R. S. Cowan, one-fourth to F. Porterfield and one-half to M. A. Spurr, sic.) Commissions $50 and interest $66.82 retained by the bank.

January 15, 1887, 1,200 shares ($25 each) Nashville & Chattanooga R. R. stock and 300 shares Tenn., Coal I. R. R. stock, sold through Latham, Alexander & Co. Net loss, $9,762.35 charged one-third

against F. Porterfield, one-third against R. S. Cowan and one-third against M. A. Spurr. Commissions $150 and interest $583.76 to May, 1887, retained by the bank.

Prior to November 12, 1886, the following sums of money were sent to Kohn, Popper & Co., by Porterfield as cashier to be credited to the Commercial national bank; and to be used as margins on certain stock transactions which he was conducting as cashier with Kohn, Popper & Co., for the customers of the bank, viz: Feb'y 18, 1886, $500 and $750; March 29, 1886, $500; April 10, 1886, $1,500; May 6, 1886, $500; May 11, 1886, $500; May 14, 1886, $2,425.44; June 12, 1886, $605.10; June 17, 1886, $1,000; July 8, 1886, $1,000; August 31, 1886, $2,000; October 6, 1886, $2,000; October 27, 1886, $1,000.

That for the one-third of the loss, $9,762.35 just stated, namely, $3,254.12, chargeable to defendant M. A. Spurr, he gave his demand note to the bank on May 20, 1887, secured by 149 shares, $7,450, of Lebanon & Nashville Turnpike stock attached and pledged in face of the note, which note was approved by the executive committee of the bank; that defendant paid the interest quarterly on this note until Dec. 10, 1889, when he took up same with proceeds of a demand note of that date for $4,000, secured by five $1,000 first-mortgage bonds of the Sheffield & Birmingham Coal, Iron & R. R. Co. and the same 149 shares of Lebanon & Nashville Turnpike stock which had been pledged on previous note, and this note for $4,000 was also approved by the executive committee of the bank; that on this $4,000 note defendant paid the interest quarterly until
58 March 16, 1893, when he took up the same with the proceeds of a demand note of that date for $5,500, secured by 150 shares, $7,500 par value, of Lebanon & Nashville Turnpike stock, $5,200 of first-mortgage bonds of Sheffield & Birmingham Coal Iron & R. R. Co., and subscription receipts and certificates of Sheffield & Birmingham Coal, Iron & R. R. Co., for $495 and $1,050, which note was also approved by the executive committee of the bank; that the defendant did not at any time inform the executive committee or directors of the bank that these notes or any part of them were given to cover losses on stocks. There was no proof tending to show that these notes of defendant or any one of them were not good and solvent, or that the last one is not now good and solvent.

That R. S. Cowan, who was at the time of these transactions assistant cashier of the bank, paid his part of said loss to the bank by his check for the same. No proof was offered as to how Porterfield paid his part of said loss, nor as to whether he had in fact paid it or not.

That all the memoranda, tickets and slips showing these purchases and sales, and the profits and losses, including the deposit tickets on which profits were credited to Cowan and Spurr were wholly in the handwriting of F. Porterfield.

The profits credited to the defendant from said sales of stock were credited to him on the books of said bank at the times of said sales; and afterwards they were credited on his pass book and drawn out by him.

That an account for the purchase of stocks in New York was car-

ried by Porterfield, cashier, with De Neufville & Co., and Kohn, Popper & Co.; that on November 26, 1886, $5,000 of the funds of the Commercial national bank were remitted by Porterfield, cashier, to De Neufville & Co., to margin the purchase of 300 shares of Tenn. Coal stock; and on November 27, 1886, the bank was charged by De Neufville & Co. on their books with $30,037.50 as the price of 300 shares of Tenn. Coal stock purchased; that on December 3, 1886, said bank was charged by De Neufville & Co., with $19,625 as the price of 800 shares of N. C. & St. L. R'y stock purchased; that on December 10, 1886, said bank was charged by De Neufville & Co., with $31,500 as the price of 1,200 shares of N. C. & St. L. R'y stock purchase; that on December 15, 1886, $10,000 of the bank's money was remitted by Porterfield to De Neufville & Co., through Latham, Alexander & Co.; that on December 15, 1886, $5,000 of the bank's money was remitted by Porterfield to De Neufville & Co. through Herzfeld & Co.; that on December 18, 1886, Porterfield,
59 cashier, sent two telegrams to Latham, Alexander & Co., as follows:

"NASHVILLE, TENN., *Dec.* 18, 1886.

Latham, Alexander & Co.:

Would like for you to take up De Neufville & Co. account as you proposed. Will remit in full whenever you ask it. We send $5,000 by this mail.

F. PORTERFIELD, *Cashier.*"

"NASHVILLE, TENN., *Dec.* 18, 1886.

Latham, Alexander & Co.:

We have with De Neufville & Co. 2,000 Chattanooga and 100 Tennessee Coal. Margin $30,000. Would like for you to take up the account and will remit whatever additional you may require. Sent you 5,000 yesterday.

F. PORTERFIELD, *Cashier.*"

That on the same day F. Porterfield wrote to Latham, Alexander & Co. as follows:

"DEC. 18, 1886.

Latham, Alexander & Company, New York city.

GENTLEMEN: We enclose herewith, for our credit, check on the National Bank of the Republic for five thousand dollars. We take the liberty today of asking you to take up our account with De Neufville & Company, because we much prefer having it with you, it having been placed there unexpectedly to us by our friend, Mr. Duncan. A few of our customers were caught with that amount of high priced coal and Chattanooga. They have protected us fully here, and we will pay up the balance in full whenever you call on us to do so. With remittances yesterday and today we do not think you will have to pay much; we wish the Tennessee Coal stock kept in line to secure the bond option.

Yours respectfully, F. PORTERFIELD, *Cashier.*"

That $5,000 of the funds of the bank were remitted by Porterfield as stated in these communications; that on December 20, 1886, Latham, Alexander & Co. paid to De Neufville & Co. for said bank $32,037.04, charged the same to it, and the stocks then held by De Neufville & Co. for account of F. Porterfield, cashier, were thereupon transferred and delivered by them to Latham, Alexander &
60 Co. and the account thereafter continued with them by Porterfield, cashier, down to the failure of the Commercial national bank; that the 1,200 shares of N., C. & St. L. R'y stock purchased by De Neufville & Co. December 10, 1886, were sold by Latham, Alexander & Co. at following dates—Jan. 13, 1887, 500 shares; Jan. 14, 1887, 400 shares; Jan. 15, 1887, 300 shares, the aggregate proceeds being $25,375; that on Jan'y 14, 1887, the Commercial national bank was charged by Latham, Alexander & Co. with $15,337.50, as the price of 300 shares of Tenn. Coal & Iron stock purchased.

No account of Kohn, Popper & Co. was put in evidence, but the purchases and sales stated as having been made through them, were shown by memoranda in the handwriting of Porterfield.

Numerous other similar purchases and sales for other customers of the bank were shown, and while defendant's counsel was cross-examining one of the plaintiff's witnesses in reference to stock purchases and sales for other customers of the bank, for the purpose of showing that they were of the same character as those made for the defendant, the question of the scope and purpose of this character of testimony was further discussed, in the presence of the jury, as follows:

The COURT: "The view of the court as to the particular transactions or matters that have just been referred to is this: The question here involved cannot be affected by what was done by the bank with other customers. Those transactions must stand or fall upon their own merits and this particular transaction cannot be affected by what the bank may have done with other parties.

Mr. PITTS: I don't know as I made myself clear, if your honor please, as to the purpose of the evidence. It was simply to show the character of the transactions and to show that they were of the same character as those proven by the Government, and belong in the same category, and so as to show it was in the ordinary course of business of the bank. That was all.

The COURT: If they were in the ordinary course of business of the bank and were illegal and in violation of its by-laws, or the statutes, it would not help matters if that practice was done. I do not mean to characterize or express any opinion about any particular transaction, but it seems to me the whole inquiry in reference to this very question is upon a collateral substance, and to refer again to what I have already said, if those transactions
61 were of an illegal character, it would not help the present situation.

Mr. PITTS: I understand that the Government offered this proof for the purpose of showing or attempting to show that Mr. Porterfield was robbing the bank, and that Major Spurr knew it. Now I

think if these transactions may not have been authorized by the law; if Mr. Porterfield was requiring these parties to put up the money or to protect the bank, and if the bank was making money out of the transactions, although they may have been unlawful, it would not be robbing the bank.

The COURT: I have not expressed any opinion, and perhaps will not be required to in this case, as to whether it was competent for the bank to carry on such business or not, but what I say is this—that if these transactions that you are now attempting to show that Mr. Porterfield was carrying, and if he did carry them on, and Mr. Spurr knew it, I would say that their effect is neither enhanced nor impaired by the circumstance, if it should be shown, that the bank was engaged in a like kind of business with respect to other customers. That is what I mean to say, and that is the basis upon which I have excluded this evidence upon these collateral matters.

Mr. PITTS: I do not understand your honor has excluded the testimony.

The COURT: No, sir; I was simply showing my reasons for refusing to go into the details of these transactions. The evidence that is now in will stand."

There was no proof of any loss by the bank on account of these transactions of 1886 and 1887, nor of any dishonesty of Porterfield in respect to them, further than might be implied from the fact that such transactions were not authorized by the national banking law.

There was proof tending to show that all the national banks of the city of Nashville conducted a like business for their customers, and that it was customary with national banks in various parts of the country to purchase and sell stocks for their customers, and to carry accounts with the New York brokers for that purpose, similar to the accounts proven in this case.

There was no evidence tending to show that defendant knew such business to be unlawful, further than that at first it was not considered by the directors as exactly the right thing to do, but that as all the other banks were doing it, and were receiving the profits, the Commercial national bank commenced doing it for its customers.

There was no evidence tending to show that Dobbins &
62 Dazy, or either of them, had any interest in, or connection with, these accounts and transactions of 1886 and 1887 or that they had any connection with the bank until October, 1891.

In reference to the transactions set forth with Kohn, Popper & Co., De Neufville & Co. and Latham, Alexander & Co., for the joint account of defendant, F. Porterfield and R. S. Cowan, there was evidence tending to show, and from which the jury might have found, that neither defendant nor said Cowan ever saw any of the accounts, statements, charge and credit tickets, deposit slips and memoranda introduced in evidence, until they were produced in these trials; that neither defendant nor said Cowan ever gave Porterfield any order or direction to purchase any stocks jointly with each other, or with Porterfield; and that neither defendant nor said Cowan knew that the other, or that Porterfield, was interested in,

or joint purchaser of, any of said stocks; but there was evidence tending to show that defendant accepted and used the exact amount of profits, and accounted for the exact amount of losses, that were shown upon the accounts, statements, tickets, slips and memoranda, made out by Porterfield in reference to said transactions.

There was also evidence tending to show, and from which the jury might have found, that the defendant did not at any time knowingly purchase any stocks, or securities jointly with Porterfield in the name of the bank, or of Porterfield, cashier; that he did not at any time have knowledge that Porterfield was speculating in the name of the bank, or using its funds in speculations, either for himself or others, without the bank being first amply secured by the deposit of funds or collaterals; and that he believed that Porterfield was honest, truthful and faithful to the bank, and was fully protecting its interests in all matters under his control as cashier, and that he and all of the officers and directors of the bank relied implicitly upon Porterfield's statements respecting its affairs.

Defendant testified that before purchasing any of said stocks in 1886, he pledged with Porterfield, cashier, to secure the bank, ample securities for that purpose, endorsed in blank and delivered to him, which were placed in an envelope and deposited in the bank, according to its custom, with collateral securities, where they remain until the purchases were all made and closed out by sale; that the securities so pledged by him and their value were: $2,600 of Prewett, Spurr & Co., stock of the value of $3,640; $5,000 of Alabama National Bank stock, of the value of $5,500; $8,000 of Leba-
63 non & Nashville Turnpike Co. stock, of the value of $4,000 to $4,800; $7,500 of Sheffield Land Co. stock, of the value of $15,000—total value, $28,140 to $28,940; and that it was a part of these same securities that were pledged as collateral security for his demand note of $3,254.12, before mentioned.

The court in the general charge, instructed the jury as follows:

"The using by its officers, of the funds and credits of a national bank in speculation on stock and cotton exchanges, carried on either in the interest of the bank or its officers as individuals, or any other persons, is unlawful; their franchises do not contemplate such operations and it is an abuse of the lawful powers of the bank, and such use is a misappropriation of the property of the bank. The fact, if it be such, that other national banks, however numerous they were, were engaged in such business, did not render it legal, nor can the opinion of other persons that it was proper, rightfully affect the view which the court and jury must take of the legality of such practices. If the jury find from the evidence that Mr. Porterfield was engaged with the knowledge of Spurr, in thus misusing the credits and funds of the bank on cotton and stock exchanges in speculation in his own or other persons' interest, the jury are at liberty to find in that a reason why Mr. Spurr should not have confidence in Mr. Porterfield's integrity and fidelity to the interests of the bank, and why Mr. Spurr would, in the exercise of his own duties have exercised a closer scrutiny of the dealings of Dobbins & Dazy with the bank,

especially if he had reason to suppose that firm was engaged in such speculations."

To which instruction the defendant then and there excepted.

Defendant requested the court to give the following special instruction, being the 13th of defendant's requests:

"13. Although a national bank has no authority by law to receive and execute orders from its customers for the purchase and sale of stocks and bonds upon margin, yet if you find from the proof that it was customary for the national banks of this city to do such business and that the Commercial national bank did such business for its customers with the knowledge and approval of its board of directors, charging commissions and interest and requiring its customers to fully protect the bank by the deposit of ample funds or securities for that purpose, and that such business was a fruitful source of revenue or profit to the bank, and such profits were
64 received and disbursed among the stockholders, and the defendant had no knowledge of, or reason to suspect, the unfaithfulness or dishonesty of the cashier in his conduct of such transactions, then the defendant cannot and ought not to be prejudiced in this case by the fact that the bank did such business, nor by the fact that he himself gave to the cashier orders for the purchase and sale of stocks on his own account if he secured the bank amply with his own securities as other customers were required to do."

Which instruction the court refused, and to which refusal the defendant then and there excepted.

Defendant also requested the court to give the following special instruction, being the defendant's 10th request:

"10. If you find from the proof that the defendant relied upon the statements and representations of the cashier as to the condition of the account of Dobbins & Dazy, and that he did so in good faith, believing those statements and representations to be true, his certifications made in honest reliance upon them would not be criminal; and if the cashier was reputed to be and believed by the defendant to be, a man of honesty and truth, the defendant would have the right to rely upon his statements in regard to that account."

The court refused this instruction in this form but modified it by interlining the words, "and such statements were made at or so near the time of the certifications as to be fairly regarded as indicating the present state of the account;" also by striking out the word "truth" near the close, and inserting instead the words "right conduct as respects the affairs of the bank" and gave it as thus modified. The said instruction, as given was as follows—the words stricken out being shown in italics and the words added, in brackets:

"If you find from the proof that the defendant relied upon the statements and representations of the cashier as to the condition of the account of Dobbins & Dazy, and that he did so in good faith, believing those statements and representations to be true (and such statements were made at or so near the time of the certifications as to be fairly regarded as indicating the present state of the account),

his certifications made in honest reliance upon them would not be criminal; and if the cashier was reputed to be, and believed by the defendant to be, a man of honesty and *truth* (right conduct as respects the affairs of the bank), the defendant would have the right to rely upon his statements in regard to that account."

65 To the modification by striking out the word "truth" and inserting in lieu thereof the words, "right conduct as respects the affairs of the bank," the defendant then and there excepted.

Defendant also requested the court to give the following special instruction, being defendant's 11th request:

"11. The fact that the cashier had bought and sold stocks and bonds or cotton futures, and that the defendant knew the fact, would not establish or imply that he was personally dishonest, nor deprive the defendant of the right to rely upon his statements in respect to the affairs of the bank, unless he also knew or had reason to believe that the cashier was despoiling the bank, and using its funds instead of his own in such transactions. In order to deprive the defendant of the right to rely upon the cashier, it must be shown beyond a reasonable doubt that he knew that *he* cashier was unfaithful to the bank and was acting dishonestly."

The court refused to give this instruction in this form, but modified it by striking out the words, "was despoiling the bank and using its funds," and inserting instead the *also by striking out the word.* "*dishonestly,*" *and insert-* words, "had been using the funds or credits of the bank;" also by striking out the word, "dishonestly," and inserting instead the words, "unlawfully in respect to its affairs," and gave it as thus modified—the instruction as given being as follows, the words stricken out appearing in italics, and those inserted, in brackets:

"The fact that the cashier had bought and sold stocks and bonds or cotton futures, and that the defendant knew the fact, would not establish or imply that he was personally dishonest nor deprive the defendant of the right to rely upon his statements in respect to the affairs of the bank, unless he also knew or had reason to believe that the cashier was *despoiling the bank and using its funds* (had been using the funds or credits of the bank), instead of his own in such transactions. In order to deprive the defendant of the right to rely upon the cashier it must be shown beyond a reasonable doubt that he knew that the cashier was unfaithful to the bank and was acting *dishonestly* (unlawfully in respect to its affairs)."

To this modification of the instruction by the court the defendant then and there excepted.

With respect to the two other accounts before mentioned, viz: of Herzfeld & Co., with "Frank Porterfield, separate" and of Latham, Alexander & Co., with "Porterfield & Spurr," counsel for the plaintiff in his opening statement to the jury, said:

"14th. As further evidence that Spurr certified the checks

66 of Dobbins & Dazy wilfully or with bad intent to injure the bank, the Government expects to prove that defendant Spurr and said Porterfield, during the period from November 10, 1890, to February 15, 1893, (which covers the period during which defend-

ant certified said checks), were engaged in other joint speculations, for the purpose of purchasing and selling cotton futures, railroad stocks and other stocks; and to use in said speculations the moneys of said bank as margins, without the knowledge and consent of its directors. That they employed a firm in New York, known as Latham, Alexander & Co., through whom to make their purchases and sales of said cotton and stock.

That defendant Spurr and said Porterfield sent to Latham, Alexander & Co., as margins, on account of said speculations, moneys of said bank, in the following sums on the following dates:

November 10, 1890	$1,500 00
December 6, 1892	4,000 00
February 4, 1893	1,000 00
February 10, 1893	1,000 00
February 11, 1893	1,500 00
February 15, 1893	1,500 00
Total	$10,500 00

That all of said moneys were the moneys of said bank, and were wholly lost to said bank in speculations.

That said Porterfield as cashier, would draw drafts of the Commercial National Bank of Nashville, upon its New York correspondent, the National Bank of the Republic, in favor of said Latham, Alexander & Co., and direct said joint speculation account of Spurr and Porterfield to be credited with a portion of the proceeds of each of said drafts.

Among the drafts so drawn, were the following, viz.:

Date.	Amount.
November 10, 1890	$11,500 00
December 6, 1892	6,500 00
February 4, 1893	3,000 00
February 10, 1893	3,000 00
February 11, 1893	5,500 00
February 15, 1893	5,500 00
Total	$35,000 00

67 Out of the proceeds of said drafts, said sums, aggregating $10,500 were credited and appropriated to said joint speculative account, by said Spurr and Porterfield, and were wholly lost to the bank.

15th. As further evidence that Spurr certified the checks of Dobbins & Dazy wilfully, or with bad intent, the Government expects to prove that defendant Spurr and said Porterfield, during the period from March 12, 1889, to March 28, 1893, were engaged in other joint speculations for the purpose of purchasing and selling railroad and other stocks; and that they used in said speculations, as margins, the moneys of said bank, without the knowledge or consent of its directors. That they employed a broker in New York, known as

Herzfeld & Co., through whom to make the purchases and sales of said stocks.

That defendant Spurr and said Porterfield, sent to Herzfeld & Co., as margins, on account of said speculations, out of the moneys of said bank, the following, among other sums, viz:

August 14, 1890	$2,000 00
October 3, 1890	2,000 00

That all of said moneys were the moneys of said bank and were wholly lost to said bank in said speculations."

And thereafter on the trial, and before the plaintiff had rested, and as part of its case-in-chief, evidence was offered by the plaintiff and admitted over the objection and subject to the exception of defendant heretofore stated, with reference to collateral matters, tending to show:

As to the account of "Frank Porterfield, separate," with Herzfeld & Co., that it was opened by F. Porterfield, in person, while on a visit to New York in March, 1889; that Porterfield remained in New York, after opening the account on March 12, until on or about the 25th of that month—purchases and sales being made under his personal direction while there, resulting in a profit of about $400, and that on the 23rd of March, 1889, he received a check on said account for $400; that a draft on Nashville was drawn for $1,500, as margin on this account, which was paid and credited on the account March 21, 1889. The proof did not show on whom or what bank this draft was drawn; but there was no proof that it was paid out of the funds of the Commercial national bank.

The evidence on the part of the plaintiff tended to show that the account was opened originally by Porterfield for the joint
68 benefit of himself and defendant Spurr, and by previous arrangement and understanding with Spurr, and F. Porterfield so testified; also that the $400 received by Porterfield while in New York was subsequently divided between him and defendant, and that the draft for $1,500, given as margins, was paid by defendant.

Porterfield testified that defendant did not withdraw from the account; that defendant well knew all the time that the purchases were continued; that the account was kept in force, and that they were jointly interested, and there was no suggestion of any withdrawal between them at any time.

The evidence on the part of the defendant, on the contrary, tended to show that defendant had no knowledge of said account nor interest in it, until on or about the 24th day of May, 1889, when Porterfield proposed to him the purchase on joint account of some stocks in New York, stating that he had a little personal account with Herzfeld & Co., and would carry the stock they might purchase on that account; also that he had put up a margin of $1,500 and had a small amount of stock on hand, and that if defendant would make a joint demand note with him in the Bank of Commerce of Nashville, for an amount sufficient to reimburse him in the margin and interest on it, defendant might have a half interest in the stocks on

hand and such further purchases as they might agree to make; that the $400 received by Porterfield on that account in March, was not divided with defendant, and that defendant did not pay nor have any knowledge of the said draft for $1,500.

Defendant's evidence further tended to show that pursuant to this suggestion of Porterfield, a joint demand note of himself and defendant Spurr, written by Porterfield, for $1,526.65 was made and discounted in the Bank of Commerce of Nashville on May 24th, 1889, the proceeds of which were received by Porterfield.

Subject to said objection and exception, there was further evidence, not controverted by the defendant, tending to show that thereafter and prior to May 6, 1890, the following stocks were purchased and sold on this account for the joint benefit of Porterfield and Spurr, namely:

100 Tex. Pac., bought June 7, 1889, sold Oct. 29, 1889.
100 Un. Pac., bought Oct. 9, 1889, sold Oct. 14, 1889.
100 Un. Pac., bought Oct. 22, 1889, sold Oct. 24, 1889.
100 N. P. Pfd., bought Oct. 25, 1889, sold Nov. 11, 1889.
100 St. Paul, bought Nov. 20, 1889, sold Jan. 29, 1890.
100 St. Paul, bought Dec. 9, 1889, sold Ap'l 28, 1890.
100 Un. Pac., bought M'ch 20, 1890, sold Ap'l 28, 1890.

69 And that 200 shares of Union Pacific, on hand May 24, 1889, were also sold—all resulting in a net profit of $1,290.52, over and above the margin of $1,500; and that on May 6, 1890, a check was received by Porterfield from Herzfeld & Co. for this profit, $1,290.52, one-half the proceeds of which he placed to his own credit, and the other half to the credit of defendant Spurr, on their respective individual accounts in the Commercial national bank.

Subject to said objection and exception, there was further evidence, not controverted by the defendant, tending to show, that after May 6, 1890, the following stocks were purchased and sold on this account with his knowledge and for the benefit of himself and Porterfield, namely:

100 N. P. Co., bought June 4, 1890, sold June 5, 1890.
100 Mo. Pac., bought June 4, 1890, sold June 6, 1890.
100 Mo. Pac., bought June 6, 1890, sold June 6, 1890.
100 L. & N., bought June 10, 1890, sold June 13, 1890.
100 Chic. Gas, bought June 11, 1890, sold June 12, 1890.
100 L. & N., bought June 16, 1890, sold Aug. 18, 1890.

Also that the following additional stocks were purchased on this account, in June, 1890, and were on hand in August of that year, namely:

100 Atchison, bought June 9th.
100 Rich. Term., bought June 11th.
100 N. West., bought June 11th.
100 Atchison, bought June 12th.
100 C., C., C. and St. L., bought June 19th.

Also that from the opening of said account in March, 1889, to August 18, 1890, there were purchased on it, from time to time, as

appeared by said account, 3,500 shares of stock of various kinds, including those just mentioned.

There was also evidence tending to show that in the summer of 1890, stocks began to decline, and that on August 11, 1890, Herzfeld & Co. called for an additional margin of $2,000 on this account to protect them in holding the stocks on hand; that on August 15, 1890, F. Porterfield and defendant Spurr made their joint demand note for $2,000 to the Commercial national bank, which was approved by the executive committee of the bank, but without knowledge that it was given for margins, and with which Porterfield purchased of the bank New York exchange for that amount
70 and remitted the same to Herzfeld & Co., and it was credited on the account with "Frank Porterfield, separate," on August 18, 1890.

Defendant Spurr, after the foregoing had been admitted, testified that on returning to the city about the 15th of September, 1890, from an absence of about two weeks, and stocks continuing to decline, he stated to Porterfield that he was unwilling to risk any more money on these stocks, and requested him to close them out when the margins were exhausted; that he agreed to do so, and afterwards reported that he had done so. He also testified that he had no interest in the account after that time; that he had no knowledge of, and was not consulted about, any further purchases on it—did not know Porterfield was continuing it; received no part of any subsequent payments that were made, and had no knowledge of any remittances to Herzfeld & Co. on it out of the funds of the bank or otherwise, and supposed the account was closed; that on February 18, 1891, he paid his half of the note of $1,526.65, to the Bank of Commerce, as shown by the books of that bank, and on same day went security for Porterfield on a renewal note for his half—Porterfield stating that it was not then convenient for him to pay it.

The account of Herzfeld & Co. with "Frank Porterfield, separate," showed the following payments and charges to Porterfield after September, 1890, viz:

Aug. 29, 1891, check	$100 00
Sept. 18, 1891, check	1,000 00
Jan. 28, 1892, check	300 00
M'ch 9, 1892, mgn. on cotton	1,500 00
Ap'l 13, 1892, check	25 00
Ap'l 14, 1892, check	75 00
Ap'l 29, 1892, check	2,103 40
Total	$5,103 40

And it was shown that the items of $1,000, Sept. 18, 1891; $300 Jan'y 28, 1892, and $2,103.40 Ap'l 29, 1892, were all credited by Porterfield upon his individual account in the Commercial national bank; that the item of $1,500, margin on cotton, March 9, 1892, was charged to him as a margin on cotton futures, in which it was admitted Spurr, the defendant, was not interested; and the two

items of $25 and $75 of Ap'l 13th and 14th, 1892, Porterfield admitted were collected by him in person, in New York. It was also shown that in March, 1893, a few days before the Commer-
71 cial national bank closed, Porterfield drew his personal check on Herzfeld & Co. in favor of the Commercial national bank, for $5,000, and deposited the same to the credit of his personal account in the bank, but the check was returned unpaid for want of sufficient credits with the drawees.

The said Herzfeld & Co. account also showed the following purchases of stocks by Porterfield and on his orders after Sept. 15, 1890, on which large losses were sustained, viz:

100 shares Atchison, September 29, 1890.
100 shares Atchison, October 20, 1890.
100 shares C., C., C. & St. L., May 19, 1891.
100 shares Tenn. C. & I., June 5, 1891.
100 shares Ches. & Ohio, September 1, 1891.
100 shares West. Union, September 8, 1891.
100 shares Tenn. C. & I., October 2, 1891.
100 shares Mo. Pac., October 13, 1891.
100 shares Tenn. C. & I., October 14, 1891.
100 shares Mo. Pac., October 30, 1891.
100 shares L. & N., November 9, 1891.
100 shares Un. Pac., December 1, 1891.
100 shares Mo. Pac., December 2, 1891.
100 shares N. P. p'f'd, January 15, 1892.
100 shares Un. Pac., January 21, 1892.
100 shares N. Y. & N. E., January 21, 1892.
100 shares N. Y. & N. E., January 25, 1892.
200 shares Reading, January 26, 1892.
100 shares L. & N., January 29, 1892.
100 shares Rock Island, February 1, 1892.
100 shares Wab. p'f'd, February 3, 1892.
200 shares Reading, February 3, 1892.
100 shares N. Y. & N. E., February 4, 1892.
100 shares L. & N., February 4, 1892.
100 shares Tenn. C. & I., February 5, 1892.
100 shares Un. Pac., February 9, 1892.
100 shares Un. Pac., February 11, 1892.
100 shares Atchison, February 17, 1892.
100 shares Wab. p'f'd, February 18, 1892.
100 shares N. P. p'f'd, February 18, 1892.
100 shares L & N., February 23, 1892.
100 shares Rich. Term., March 4, 1892.
100 shares N. P. p'f'd, March 28, 1892.
100 shares Un. Pac., March 29, 1892.
100 shares St. Paul, April 11, 1892.
100 shares Tenn. C. & I., April 25, 1892.
100 shares L. & N., June 20, 1892.
100 shares L. & N., June 27, 1892.
72 100 shares Rock Island, July 14, 1892.
100 shares Un. Pac., August 12, 1892.

100 shares Rock Island, September 1, 1892.
100 shares L. & N., September 30, 1892.
100 shares St. Paul, November 4, 1892.
100 shares Un. Pac., November 4, 1892.
100 shares Rock Island, November 28, 1892.
100 shares St. Paul, January 31, 1893.
100 shares Wab. p'f'd, February 9, 1893.

Said Herzfeld & Co. account also showed the following charges and credits for margins, profits and losses on cotton futures, in which it was admitted defendant was not interested, namely:

Charges.

M'ch 9, 1892, to margin on cotton contract	$1,500 00
Ap'l 29, 1892, to check (profit on cotton)	2,103 40
Nov. 9, 1892, to loss, 400 b. c. January	971 90
Nov. 9, 1892, to loss, 400 b. c. February	1,026 30
Nov. 9, 1892, to loss, 400 b. c. March	1,041 35

Credits.

M'ch 21, 1892, by cotton margin returned	$1,500 00
Ap'l 25, 1892, by transfer cotton ac. (profits)	2,103 40
Sept. 26, 1892, by profit 600 b. c	647 40
Nov. 16, 1892, by profit 500 b. c. January	1,239 85

Said account also showed the following sums of money remitted by Porterfield to Herzfeld & Co., on this account after Sept. 1890, which Porterfield admitted were from the funds and credits of the Commercial national bank, viz:

October 10, 1890	$2,000 00
October 18, 1890	1,000 00
November 10, 1890	2,000 00
November 12, 1890	1,000 00
November 24, 1890	3,000 00
July 30, 1891	1,000 00
May 23, 1892	1,000 00
June 10, 1892	2,000 00
October 29, 1892	1,152 30
February 27, 1893	1,500 00
March 2, 1893	2,000 00
Total	$17,652 30

73 Porterfield testified that defendant knew he was sending margins there to protect the account, and that the money Porterfield was sending there to margin the account was the money of the Commercial national bank.

As to the account of Porterfield & Spurr with Latham, Alexander & Co., the tendency of the evidence was the same as that in rela-

tion to the account of "Frank Porterfield, separate," with Herzfeld & Co.

It was opened early in October, 1889. The sum of $2,000 was remitted by Porterfield to Latham, Alexander & Co., as margin, Spurr furnishing one-half of this sum and Porterfield the other half, out of their own means. All correspondence with Latham, Alexander & Co., in reference to the account was conducted by Porterfield.

This account showed purchases and sales of stocks, running as follows:

Oct. 3, '89. 100 shares Oct. 4, '89. 100 shares	sold	Oct. 30, '89.	Profit..		$437.50
Nov. 4, '89. 200 "	"	Nov. 8, '89.	"		237.50
Nov. 12, '89. 200 "	"	Nov. 20, '89.	"		3,150.00
Nov. 21, '89. 100 " Nov. 29, '89. 100 "	"	Dec. 2, '89.	Loss.....	$200.	
Dec. 2, '89. 100 "	"	Dec. 11, '89.	Profit..		125.00
Dec. 2, '89. 200 "	"	Ap'l 29, '90.	"		600.00
Jan. 30, '90. 100 "	"	M'ch 19, '90.	Loss....	650.	
Jan. 31, '90. 100 "	"	Aug. 27, '90.	"	187.50	
M'ch 19, '90. 100 "	"	M'ch 29, '90.	Profit..		350.00
June 9, '90. 100 "	"	Aug. 27, '90.	Loss....	212.50	
Aug. 19, '90. 100 "	"	Sep. 8, '90.	"	187.50	
Sept. 26, '90. 100 " Sept. 29, '90. 100 "	"	Nov. 12, '90.	"	2,775.00	

There was no controversy by the defendant concerning the purchase and sale of the foregoing stocks. He admitted in his testimony that he was consulted about them by Porterfield, and authorized them to be made. But the defendant testified that there were other transactions in stocks and cotton futures appearing subsequently on said account about which he was not consulted, of which he had no knowledge, and which he did not authorize.

Defendant testified that while in Florence, Ala., on the 11th of November, 1890, and noticing that stocks were weak and declining on account of financial disturbances resulting from the Baring failure, he telegraphed Porterfield to sell their Louisville & Nashville stock, being the 200 shares last appearing on the above statement and which had been purchased on Sept. 26 and 29, 1890; that these were all the stocks they then had on hand, as he understood, and that on his return home a few days thereafter, he was informed by Porterfield that the stocks had been sold.

There was also evidence in this connection tending to show, that in November, 1892, Porterfield exhibited or read to defend-
74 ant a letter from Latham, Alexander & Co., advising the purchase of cotton futures, and expressing the opinion that cotton would advance; that Porterfield suggested that they should buy some cotton futures on this account with Latham, Alexander & Co.; that Spurr replied that he did not know anything about cotton and had no money to put up as margins, and asked Porter-

field how much money they then had to their credit with Latham, Alexander & Co.; that he replied, about $2,000 and stated that he, Porterfield, had $1,000 which he did not need and would send as margins for the cotton; whereupon Spurr assented, and Porterfield sent, of his own means, the $1,000 as margins, on November 14, 1892, by the following letter:

"NASHVILLE, TENN., *Nov.* 14, 1892.

Latham, Alexander & Co., New York city.

GENTS.: Referring to your telegram of this date, I enclose herewith draft on New York for one thousand dollars on account of Spurr & Porterfield. If you have any hesitancy on this matter please wire on receipt of this, and will remit what you call for, or if you prefer it close out the account. Please let me know what margins you require on cotton and oblige.

F. PORTERFIELD (*Personal*)."

That on November 14, 1892, 500 bales of cotton were bought on this account, and sold on November 16, 1892, at a profit of $595.02; that this profit was sent by check to Porterfield and its proceeds divided equally between him and defendant Spurr; that on November 19, 1892, two other lots of 500 bales each were purchased—one of which was sold on November 25, 1892, at a profit of $983.20 and the other on December 27, 1892, at a profit of $624.43, both sums being credited by Latham, Alexander & Co., to Porterfield and Spurr on their account.

Defendant admitted that he authorized these three purchases of cotton, and was fully informed of them by Porterfield.

It appeared that other purchases of cotton were made by Porterfield on this account, namely: 1,000 bales on December 1, 1892, 500 bales on December 27, 1892, and 1,000 bales on February 21, 1893; but defendant testified that he was not consulted about these latter purchases, had no knowledge of them and did not authorize them.

The account of Latham, Alexander & Co., also showed the
75 following purchases of stock which defendant testified he was not consulted about, and did not know of or authorize, namely:

100 shares North America, bought September 29, 1890.

200 shares Reading, bought August 19, 1892.

Porterfield testified that defendant knew all the time that the purchases were continued and the account was kept in force, and they were jointly interested and there was no suggestion of withdrawal between them at any time.

On the 2,500 bales of cotton and the 300 shares of stocks last mentioned, losses were sustained amounting to over $15,000.

There was also evidence tending to show, that Porterfield sent to Latham, Alexander & Co., on this account, out of the moneys and funds of the Commercial national bank, the following sums, credited on the account at the dates stated, namely:

Nov. 14, 1890	$1,500 00
Dec. 8, 1892	4,000 00
Feb. 7, 1893	1,000 00
Feb. 13, 1893	1,000 00
Feb. 14, 1893	1,500 00
Feb. 18, 1893	1,500 00
M'ch 1, 1893	2,600 00
Total	$13,100 00

Defendant testified that he was not consulted about any of these remittances, had no knowledge of them and did not authorize them; and that they were not necessary to protect any purchase that he had knowledge of or authorized.

Defendant also testified that he had no communication at any time until after the failure of the Commercial national bank, with Latham, Alexander & Co., concerning this account in any way, either in person or by mail or telegraph; that the correspondence was conducted entirely by Porterfield, who reported to him the buying and selling prices, and the profits and losses, on the transactions made by them jointly, which they always conferred about before making them; that he had no knowledge or suspicion that Porterfield was using the bank's funds in this way or in any other transaction for his personal interest or that of others.

There was testimony for plaintiff by Porterfield tending to
76 show that defendant knew of all these purchases made by him, Porterfield, on both of these accounts; and that defendant knew he was remitting the moneys of the bank to New York upon them.

Porterfield, just before leaving the stand, and after having admitted using the moneys of the bank in his various speculations and making false reports in order to conceal the true condition of the bank, but having stated that he did not intend to rob the bank, was asked by counsel for the Government to make any statement or explanation of the matter he wished, and he explained as follows:

"I would state, in regard to those transactions, that some time after the organization of the bank, there was quite a speculative craze here in Nashville in a great many things and some of them were offered to me, out of which money could be made in various speculative enterprises. I was offered an opportunity to go into some of them by some of my friends, and I did go in and made some money, and after that I continued to speculate in various ways, sometimes making and sometimes losing; but there came a time when the losses became heavy, and in keeping up the margins on certain stocks I exhausted my own available means, and then I began to send on moneys of the bank, to use the moneys of the bank, in that way; I took them with no intention of robbing or defrauding the bank; I believed that I would be able to replace these moneys, and I had no criminal intent at the time, but I hoped that everything would revive and I

could in that way replace the money, which I had taken. I had no thought of robbing or defrauding the bank, but I continued to speculate, and afterwards I got beyond my depth, and was obliged, in order to keep up, in the course of time, and not being willing that these matters should appear on the books in a true light, and to the extent of such large amounts, to make entries which were misleading, and did not state the true facts. I knew very well that I was doing wrong all the time, and I could not but believe it, and I felt it more than ever at last when I had to make entries on the books in order to conceal exactly the true state of affairs.

I will say I did not consider I was robbing the bank, because such was not my intention at any time; of course, I can see I was not doing right, in fact, I knew I was doing very wrong, and when the crash came at last and my ruin became utter and complete, I met the punishment that was proper, no doubt, meted out to me; just what I have suffered I would not undertake to say; indeed,
77 I could not, but I should think that any one could understand what a man would suffer when he has lost his good name, and brought stain and dishonor upon it, and dragged others with him, and knows as fully as I do, what others have suffered as a result of his own wrong-doing; that is all I desire to say in regard to this transaction."

There was no evidence tending to show that Dobbins & Dazy, or either of them, had any interest in, or any connection with, either of these accounts of "Frank Porterfield, separate," with Herzfeld & Co., or "Porterfield & Spurr" with Latham, Alexander & Co.

Defendant requested the court to give the following special instruction, being defendant's 14th request:

"14. The fact that the defendant, jointly with Frank Porterfield, bought railroad stocks, through Latham, Alexander & Co., in their joint personal names and with their own means, is not evidence of the dishonesty of either; nor is the fact that they bought in the same way, similar stocks in the name of Porterfield, individually, through Herzfeld & Co.; and if you believe that these accounts were mere personal transactions, not involving the bank in any way, so far as the defendant was concerned, and that he did not know of, or consent to, the use of the bank's funds by Porterfield in those transactions, he cannot be affected and ought not to be prejudiced by any such misuse of the bank's funds by Porterfield."

Which instruction the court refused, because the subject was covered by other instructions, and to this refusal the defendant then and there excepted.

In addition to the portions of the general charge and special instructions heretofore set out, the court gave the 12th special instruction asked by defendant, after modifying it in a manner not excepted to, as follows:

"12. The defendant is not indicted in this case, nor being tried for buying and selling stocks or bonds or cotton futures, nor is it any crime against the laws of the United States for a bank officer to deal in such matters. (I interpolate: On his individual account, without involving the bank.) You should not allow the proof on

this subject to influence your verdict in any way, unless you find from the proof, beyond a reasonable doubt, either that the defendant used the bank's funds dishonestly in such transactions or that he knew that the cashier was using the funds of the bank for his own personal interest, or the interest of others. If you find, beyond a reasonable doubt, that the defendant did know of the unlawful use of the bank's funds by the cashier, as before indicated,
78 that fact would not establish the defendant's guilt in this case, but would only be a circumstance to be considered by you in connection with the other evidence, on the question whether defendant knew (or was charged with knowing because he purposely abstained from knowledge) at the time of certifying the checks mentioned in the indictment, that Dobbins & Dazy did not have funds and credits on deposit in the bank sufficient to meet those checks."

The court also instructed the jury, in the general charge, among other things, as follows:

"The defendant is not on trial directly for his complicity with such previous speculations and misuse of the bank's property in them, and proof of them has been admitted, and is to be applied by the jury solely upon the question of knowledge and intent of the respondent when he made the false certifications of the checks mentioned in the indictment."

The plaintiff introduced all its evidence before it rested, no witness being offered by it in rebuttal after defendant's witnesses were examined; nor did the plaintiff offer any evidence as to the general character or reputation to the defendant; nor as to his reputation for veracity or honesty.

The defendant testified as a witness in his own behalf, his direct and cross examinations both being at great length and occupying parts of three days.

Having testified on his direct examination that before making any of the purchases of stocks in 1886 and 1887, mentioned in the testimony for plaintiff, he pledged to Porterfield, cashier, the stocks and securities heretofore mentioned, to secure the bank in such purchases, and that said stocks and securities remained so pledged and in possession of the bank until all the purchases made for him through the bank were closed out, and his note for $3,254.12 made and secured with part of said stocks, as heretofore stated, he was cross-examined by counsel for plaintiff on this subject as follows:

"Q. You have stated that when you determined to go into those stock transactions, if I caught you correctly, you went to Mr. Porterfield and you deposited with him certain stocks to secure the bank against any loss that might result from any of your transactions in those stocks. Is that correct?

A. Yes, sir.

79 Q. Now, will you kindly state to the jury a list of the stocks that you deposited with Mr. Porterfield on that occasion?

A. My recollection is there was five thousand dollars of Alabama National Bank stock; twenty-six hundred dollars of Pretett, Spurr & Co. stock; eight thousand dollars of Nashville & Lebanon Turn-

pike Co. stock, and seventy-five hundred dollars of Sheffield Land Co. stock; and when I deposited these stocks I said to Mr. Porterfield, I have more stocks, which I can give you if necessary.

Q. Mr. Spurr, are you distinct in your recollection about the seventy-five hundred dollars of Sheffield Land Co. stock?

A. That is my recollection, sir.

Q. I will ask you, to refresh your memory only, whether on May 14, 1894, you did not say, as I read here, "I have no list showing the exact securities that I deposited with the bank, but I have a list showing the securities I had on hand the first of January, 1887, and from that list I can name some of the securities I deposited with the bank. Q. Please name that, Mr. Spurr? A. Eight thousand dollars of Lebanon and Nashville Turnpike Co. stock; five thousand dollars of Alabama National Bank stock; twenty-six hundred dollars of Prewett, Spurr & Co. stock, and from that list I think there were others, but I cannot state positively. That is the list I made the first of January, 1887, of what I had in the way of stocks and securities." Was not that your answer?

A. Yes, sir; that was my answer.

Q. You have refreshed your mind and you are satisfied you put in the seventy-five hundred dollars of Sheffield Land Co. stock?

A. Yes, sir; and I said at that time that I was not positive, but I thought I had deposited seventy-five hundred dollars of Sheffield land, and I am positive now that I did.

Q. Now, what has, since that time, called your mind to the fact that you put up that Sheffield & Birmingham stock—$7,500 in addition?

A. I think that, Mr. Baxter, sometimes, when a question is raised you might not remember it, and if you think about it, it grows upon you and the conviction becomes positive. I want to state right here that such instances have occurred in the last year or two in regard to the bank affairs. Sometimes I have been asked by the proper officials about a transaction about which I had no
80 recollection, but after being allowed to think about it, and look into it, the thing became very fresh in my mind, and that applies to a great many transactions.

Q. You have given this matter considerable thought, and you are now satisfied you did put in the $7,500 of Sheffield & Birmingham stock?

A. Yes, sir.

Q. Now, are you satisfied that is all you have put in which you have enumerated, that you have enumerated all the stock you put in with Mr. Porterfield?

A. Yes, sir.

Q. Tell the jury what that $7,500 of Sheffield & Birmingham stock was worth?

A. It was worth $15,000.

Q. That makes $15,000, then?

A. Yes, sir.

Q. Tell the jury what the other stock you put up was worth?

A. The Lebanon & Nashville Turnpike stock was worth, at a low figure, 50c. and I considered it worth more.

Q. There was $8,000 of that, and that would make $4,000?

A. Yes, sir.

Q. Now, the other stock?

A. The Alabama National Bank stock, my recollection is, was worth 110 about that time.

Q. Now, Prewett & Spurr stock?

A. That was about 140, I think.

Q. Now, I will ask you if you did not state on the same occasion that I have asked you about, if this question was not put to you and you made this answer:

Q. "Then, if I understand you correctly, the stock that you pledged to the Commercial national bank to secure it against loss on these purchases made by you amounted, at that date, according to your best recollection, to about $13,400 in cash, if I am right in my figures? A. That is right."

A. That is my recollection of the way I stated it.

Q. To those you now add the Sheffield & Birmingham stock at $15,000, and if I understand, the total value of securities you put up to secure the bank amounted to about $28,000 or $29,000?

A. I have not figured them out, and I don't know.

Q. That would be that, would it not?

A. Between $25,000 and $30,000.

Q. Now you mention that $15,000 of new stock; that would amount to about $28,000, would it not?

81 A. Yes, sir.

Q. Now, as I understand, Mr. Spurr, you deposited with Frank Porterfield about $28,000 in value of various kinds of stock to secure the bank. On what day did you make that deposit?

A. I don't remember the day.

Q. Can you remember the year?

A. In 1886, I know.

Q. Was it the first part or the latter part of 1886?

A. I don't remember, sir, what part; I think it was the latter part—some time in the latter part of the year—but I don't remember when.

Q. Then, if it was the latter part of the year, was it in August, September, October, November or December?

A. I have no data, Mr. Baxter, showing the month.

Q. Don't you think you could refresh your mind on that and give us the day?

A. No, sir; there is nothing I have been able to come across yet that will give the date.

Q. Did you just hand them to him in a bundle or put them in an envelope?

A. I put them in an envelope showing the contents.

Q. Was there anything on the envelope to show what you put in the envelope?

A. No, sir; it was a custom of the official receiving the collaterals to put that there himself.

Q. Well, did you see him put anything on it when you handed it to him?

A. Well, I don't recollect. I was not watching Mr. Porterfield about those little things. I just made a statement to him and told him what was there, and took it for granted he made the proper entry, put the proper writing upon the envelope.

Q. Your certificates were all endorsed in blank?

A. Yes, sir.

Q. Did you take any receipt from him?

A. No, sir; I did not. I never took a receipt from a banker for any collateral placed with him.

Q. Did you take any memorandum of any kind from him?

A. I did not, sir.

Q. So, in case of his death, or your death, there would have been nothing to show as to who those stocks belonged, if they were endorsed in blank?

A. Yes, the memorandum he made on it; I took it for granted that he made a memorandum upon it.

Q. But you didn't see him make any?

82 A. I did not. I have no recollection of seeing him make any, and I know it was my custom, whenever collaterals were placed with me, to do that.

Q. If I understand you, Mr. Spurr, you carried an envelope to Mr. Porterfield containing about $28,000 worth of stocks and securities and endorsed in blank, and without seeing him make any memorandum upon it, and without getting any memorandum or receipt whatever from him, you left them with him?

A. I have no recollection of seeing him make any memorandum, and I took no receipt, because that was never done; I never knew it to be done."

The defendant, on direct examination, also testified, in substance, that he did not know or have any information or suspicion that Dobbins & Dazy's account in the bank was overdrawn at any time during the period covered by the checks mentioned in the indictment; that while acting as cashier during Mr. Porterfield's illness in December, 1890, and January and part of February, 1891, he caused to be opened and kept by the book-keepers two little overdraft books, one for each of the two individual ledgers, for the purpose of showing the overdrafts of customers; that after the bank failed and he was charged with certifying checks of Dobbins & Dazy, remembering those little books and that he had never seen any overdraft of Dobbins & Dazy upon them, he inquired for them, both of the bank examiner while in charge, and afterwards of the receiver, and was told that none of them could be found—it having also appeared by plaintiff's proof that all of said overdraft books had been lost and could not be found, except the first one, containing overdrafts on individual ledger A to K up to April, 1891; that he had never known of the Dobbins & Dazy account being overdrawn, except that on one occasion during the early period of the account he inquired of Porterfield how the account was getting

along, and he, in response, informed him that it had been overdrawn, but had been made good; that he now and then made such inquiries of Mr. Porterfield, and his reply always was that it was perfectly satisfactory and very profitable; that the custom of the Commercial national bank in reference to certifying checks and marking them good was, that when a check was presented by a customer for certification with a view of going into circulation, and the customer had sufficient funds in the bank, the teller stamped it with a certification stamp kept for that purpose,
containing the words "Certified, Commercial national
83 bank, Nashville, Tenn. ——— ———, teller"—the blank
space being left for the teller's name to be written in—
and it was then passed through the account of certified checks, but where a check was presented by an associate bank of the city between settlement hours, and the drawer had sufficient funds in the bank, such check was marked "Good" by some officer of the bank simply as an indication that it would be paid at the next settlement hour, and no entry was made of it on certified check account, and that there was no custom of the bank making any distinction in the form of the certification or the officer by whom it was made based on the fact that the money was there or was not there—that no custom of the bank recognized the right of any officer to either certify with the stamp or mark "Good" a check when the drawer did not have sufficient funds in the bank to meet it; also that on account of the large amount of money required to handle the Dobbins & Dazy account, and the necessity of sometimes selling New York exchange to meet the balances due the other banks on daily settlements, Mr. Porterfield gave instructions for all checks of Dobbins & Dazy to be sent back to him and their deposits reported to him, that he might be constantly advised of the same and have opportunity to sell exchange to meet balances if necessary; and that he believed at the time he certified every check of Dobbins & Dazy which he did certify, from information received by him at the time from either Mr. Porterfield or the exchange clerk, that Dobbins & Dazy had sufficient funds in the bank to meet the check.

And thereafter defendant was cross-examined on these subjects by counsel for plaintiff at great length as follows:

"Q. I understood you to say you did not know from November 25, 1892, until the bank failed, that you had no knowledge during all that time, that Dobbins & Dazy's account was overdrawn a single day during all that period?

A. I do say so, sir.

Q. And you thought that every day during that period they had a credit balance?

A. I don't say I thought about it every day. As far as my knowledge extends, I had no knowledge of that account being overdrawn during those dates.

Q. Had you ever heard from any one during those dates that the account was overdrawn?

A. Never had.

84 Q. And never heard any intimation of it?

A. No, sir, none whatever; no suspicion of it.

Q. Do you know of any one else who worked in that bank, from the porter, who swept the floor, to the president of the bank, that did not know that Dobbins & Dazy's account was largely and continuously overdrawn during that period except yourself?

A. I don't know, sir; I never discussed that question with any of those clerks; I never asked them what they thought about it and what they heard.

Q. I was asking you if you knew or could give the name of any one in the bank that did not know of it?

A. I cannot. I never heard them discuss it, and don't know what they thought or what they had heard.

Q. Mr. Spurr, you stated in your original examination with reference to the overdraft books, as follows: 'I went to my attorney and stated that overdraft books had been kept in the bank showing the amounts overdrawn by any of the individual depositors and my recollection was then, and was very strong, that I had never seen the name of Dobbins & Dazy on that account.' Was that correct?

A. Yes, sir.

Q. Did you mean, in that statement, to your attorney, that you had seen the overdraft books and that they were kept after Dobbins & Dazy's account had been brought to the bank and that they did not show any overdrafts of Dobbins & Dazy on them?

A. That is what I believed at the time.

Q. That you had seen the books after that?

A. I had seen them for some time——

Q. After Dobbins & Dazy's account was brought to the bank?

A. Yes, sir.

Q. And that there was no overdrafts of Dobbins & Dazy appearing on the books when you saw them?

A. Yes, sir.

Q. You stated on your original examination with reference to the taking of the Dobbins & Dazy account by the bank: 'I remember very well Mr. Dudley's making the point that a house like that would want a great deal of money, that it might be overdrawn and likely would be overdrawn, and he was opposed to it. He stated that very emphatically and I understood our instructions were, so far as I can recollect, that it should not be done, that it was understood that it should not be overdrawn.' Is that correct?

A. Yes, sir.

85 Q. Did you not object to the taking of the account, that it would be difficult to furnish the necessary currency to handle it?

A. Yes, sir.

Q. Did you not know soon after the account of Dobbins & Dazy was taken by the bank that it was overdrawn?

A. I have stated that I had heard that it had been overdrawn but that it had been made good, and my recollection was it was in

response to an inquiry by me to Mr. Porterfield in regard to it, as to how the Dobbins & Dazy account—how they were getting along.

Q. Had anybody told you that it was overdrawn?

A. That led me to ask that question of Mr. Porterfield now and then, just like Major Dudley, how the account was getting along.

Q. You had not heard when you asked that question that the account had been overdrawn?

A. My recollection is as I have stated.

Q. Well, I don't think you have stated that, Mr. Spurr, in your original examination.

A. I have stated to you just now, Mr. Baxter.

Q. Well, I don't understand you to answer that question yet; did you or not?

A. I have stated yes, that I did.

Q. Then you had heard that the account was overdrawn before you made that inquiry?

A. That is my recollection and it was in response to an inquiry that I had made of Mr. Porterfield as to how the account was getting along, how they were going, I mean to say, how Dobbins & Dazy were getting along.

Q. My question was, when you asked Mr. Porterfield that question, how the account was getting along, had you heard before you asked that question that the account had been overdrawn?

A. No, sir; that was the only time I had heard it was overdrawn.

Q. When you certified the checks of Dobbins & Dazy, did you ask the teller or the ledger book-keepers of the bank, if the account of Dobbins & Dazy was overdrawn at the time?

A. I did not.

Q. Did you know then whether they had the money to their credit sufficient to cover the checks which you certified?

A. No, sir; I did not.

Q. Mr. Spurr, when a customer of that bank had money to
86 his credit, who, according to the usage and custom of the bank, certified the checks?

A. When a customer presented a check for certification and he had the money to his credit, what we call a certified check, it was stamped and signed by the teller; that is when it was going into circulation, but when a check was presented by an associate bank and the man had the money to his credit or the depositor had the money to his credit, it was marked good by the teller, by the cashier, the assistant cashier or president.

Q. Then, if I understand you, whenever a check was presented for certification it was marked good if it was intended to be used here in the city and not to go into circulation, but turned in at the exchange hour, either the teller, cashier, assistant cashier or president marked it good whether there was any money there or not, is that true?

A. No, sir; I did not say that.

Q. Well, suppose there was money to his credit, who marked the check then?

A. It was the custom of the bank whenever a check was pre-

sented to be certified and the man had the money to his credit for the teller to mark it good or to be marked by the officers mentioned; that is, when the money was actually on deposit, or it was known that he had the money there.

Q. I am not asking for any difference between the checks that were certified to go into circulation and checks certified for the use of some bank here to be returned at the exchange hour. I am not asking for the difference of that kind, but I am asking for the difference when a customer had money in bank and when he did not. My question to you is, when a check was presented for certification what was the difference in certifying it whether the man had the money to his credit in bank or whether he did not; that is, according to the usage of the bank?

A. It was not the custom of the bank to certify or mark good any check unless the money was on deposit to the credit of the individual as I have stated. When a customer or depositor had money to his credit and he wanted it to go into circulation, why it was usually certified with a stamp by the teller, but where it was presented by an associate bank with a view of coming in at the next exchange or settlement hour, it was marked good by the teller, cashier, assistant cashier or president.

Q. Was it marked good by the cashier, assistant cashier or teller without reference to whether the drawer of the check had the money in bank or not?

87 A. I can only state in regard to these checks where the information came from.

Q. I am not asking about these Dobbins & Dazy checks, but I am asking about checks generally that are marked good or certified without regard to who drew them.

A. I can just state to you what I have already stated. A man might present a check for, say five thousand dollars, and the cashier might know that he had the money to meet it although it had not passed to the books, then it would be certified by him, or the assistant cashier or perhaps president.

Q. Without stopping to inquire?

A. Without referring to the teller at all.

Q. And without stopping to examine whether the account was overdrawn more than five thousand dollars or not?

A. No, sir, I did not say that at all.

Q. Was it not the practice of the cashier, assistant cashier or president, when they certified a check to see whether the man had the money to his credit or not? When a man had a note discounted, say for five thousand dollars, would they see whether his account was or was not overdrawn more than five thousand dollars before they certified a check for it?

A. I should think it would be. I had reference to this specially; frequently an account is opened with a bank by a loan and the proceeds of that loan would not appear upon the books of the bank at all, and when a check was presented in that way the cashier would mark it good.

Q. But I am asking where a man, like Dobbins & Dazy have

already gotten an account with the bank and the account is overdrawn from day to day, anywhere from twenty-five to one hundred thousand dollars a day, if they come in to get a note discounted for five thousand dollars, would you certify a check for forty or fifty thousand dollars without making inquiry as to whether the account was overdrawn that day or not?

A. If I had any sort of suspicion that the account was overdrawn, or if I knew it—I mean now in regard to Dobbins & Dazy's account. It was understood and I got my information from Mr. Porterfield that he kept up with that account almost hourly; that he knew its deposits, and that he knew its checks, and for that reason I believed he was familiar with it and I went to him and got my information in regard to that account.

Q. That is, you went to Mr. Porterfield in reference to the Dobbins & Dazy checks when you certified them?

88 A. I did, sir.

Q. Then you went to Mr. Porterfield with reference to Dobbins & Dazy's checks when you certified them?

A. Yes, sir.

Q. Tell us what you did about other people's checks. Did you go to Mr. Porterfield about other people's checks when you certified them?

A. I really had nothing to do with that. Of course I can recollect instances where I marked checks good, but those were matters that were rarely referred to me.

Q. You have certified checks for other people, other than Dobbins & Dazy have you not Mr. Spurr?

A. Yes, sir, I have.

Q. Now, my question to you was, When you certified checks other than Dobbins & Dazy, did you go to Mr. Porterfield for information or who did you go to?

A. It depends upon the hour of the day.

Q. Just take any hour of the day; I am not particular about the hour of the day.

A. I will say this; I went wherever I thought I could get the information, the teller, or book-keeper.

Q. Who is the proper man to go to in the bank when you want to know whether an account is overdrawn? I am not talking about Dobbins & Dazy's, but anybody's. Suppose I had an account with the Commercial national bank and I wanted you to certify a check, who would you, in the ordinary course of business, go to, to find out whether or not you could certify that check?

A. Either go to the book-keeper or teller and ask him what he knew about it.

Q. The teller or the book-keeper would be the ordinary place to go for such information?

A. Or I would refer the matter to the cashier.

Q. Would you suppose the cashier in the back of the bank would know?

A. The cashier was right along with the clerks.

Q. Wasn't he at the back of the bank close to you?

A. No, sir, he was not close to me.

Q. Wasn't he nearer to you than to the teller of the bank?

A. Yes, sir, a little nearer.

Q. Now, why wouldn't you go to the teller or the book-keeper to find out about it?

A. I would go to whoever I thought would give the information. It was a matter I did not have to look after much and which I had scarcely anything to do with and in this instance I was relying on the information I got from Mr. Porterfield on this account.

89 Q. Now, I will ask you if you can remember one single instance where the teller of that bank ever refused to certify a check of a customer who had the money to his credit?

A. I don't know anything about it.

Q. You cannot recollect any such instance?

A. I have no recollection of anything of that kind and it would not come before me.

Q. Did you ever certify a check for any one except Dobbins & Dazy for as much as ten thousand dollars?

A. I can't recollect whether I ever have or not, sir.

Q. I place before you the certified check account found in general ledger No. 3, which has been proven that it covered a period from July 11, 1890, to the failure of the bank in March, 1893; will you please look through that account and state the largest certified check that you can find in that whole account from July 11, 1890, down to the failure of the bank?

A. This is July, but I don't know what year it begins. You want to know the largest check I find here? Here is one for $9,198.63; here is one for $5,000.

Q. See if you can find anything over $9,000?

A. Here is one for $4,900; one for $5,000; another of $5,000; another of $4,250; another for $4,952; another of $5,000; another $5,426.66. That is all that are $5,000 and over. This ends in August, 1892.

Q. The largest check you found on that ledger was between nine and ten thousand dollars?

A. Yes, sir.

Q. Now, what is the largest check on the next ledger there before you?

A. Here is one for $8,248.10. That is the largest of these that appear here.

Q. Then, between nine and ten thousand dollars is the largest check you can find certified on either of those ledgers?

A. Yes, sir.

Q. Did you know that Mr. Fuller, the teller of the bank, certified some of the checks of Dobbins & Dazy?

A. I did not, sir.

Q. Did you know that Mr. Scoggins, the assistant cashier, had certified some of them?

A. No, sir.

Q. Didn't you ask Mr. Scoggins to certify some of them?

A. No, sir; Mr. Scoggins has testified I told him I knew nothing

about a certain check; that Mr. Porterfield said was all right. I knew nothing about it.

90 Q. Were not there two occasions when these young men from the Fourth national bank brought checks to Mr. Scoggins and he brought them back to you, on two occasions?

A. No, sir; I don't remember it, sir.

Q. Do I understand you to say it did not take place as those young men stated?

A. No, sir; I do not say those young men did not bring checks to Mr. Scoggins.

Q. Do you say Mr. Scoggins did not take them back to you?

A. No, sir; all I know about it is what he said here on his oath. I had no recollection when this trial first came up of his having brought a check to me under any circumstances.

Q. Did you know Mr. Porterfield was certifying any of the checks?

A. I knew that he had certified a few checks, but how many I didn't know. At least, I had seen him certify two or three or four.

Q. Do you remember when Mr. Bowron testified here, one of those young men, that he brought you a check and you told him to take a seat and wait until Mr. Porterfield came back?

A. I don't remember Mr. Bowron at all. I remember messengers from the Fourth national bank presenting checks.

Q. Do you remember telling the young man to wait there until Mr. Porterfield came back?

A. My recollection is I did.

Q. Do you remember telling him the reason that you wanted him to wait was, Mr. Porterfield attended to that?

A. Very likely I did.

Q. What matters were you referring to?

A. Mr. Porterfield wished to keep up with this account of Dobbins & Dazy, as I have already stated, to know its condition almost hourly with a view of enabling him to provide means to meet any balance that might come against it. He kept up with it and that is what I referred to, that he looked after those things and when those things were presented to me I was a very busy man and was fearful I might fail to report to Mr. Porterfield any checks I might mark good and, as I said, he was looking after it and it was his wish that those matters should all come to him and be referred to him.

Q. A young man had come to you to get you to certify the check of Dobbins & Dazy; isn't that so? Well what about it; he came for that purpose?

91 A. So I stated.

Q. Now, you told him, knowing that he came there for you to certify that check, that Mr. Porterfield attended to those matters?

A. Yes, sir, and I have stated why I wanted him to wait.

Q. Now, here are the checks that were certified either by you or by Mr. Porterfield or by Mr. Scoggins or by Mr. Fuller. Now, do I understand you to say, as president of the bank, all of those checks were certified between November 25, 1892, to the failure of the bank,

some of them for as much as forty thousand dollars apiece, and that you did not know they were being certified at all?

A. I do state so, sir.

Q. Was Mr. Porterfield in the bank when Mr. Bowron brought you the checks to be certified that he testified about?

A. I have stated that I do not remember Mr. Bowron.

Q. Was Mr. Porterfield in the bank when Mr. Davis brought the checks to you to be certified?

A. I make the same answer because I do not remember Mr. Davis at all. I cannot recall the young man at all; it may have been him.

Q. Now, I understand you in your original examination to say that 'Mr. Porterfield notified you that he had instructed the teller to send all the checks of Dobbins & Dazy back to him without exception, as you understood, and that his idea was this; that his object in having that done was that he might keep fully posted, almost hourly you might say, in regard to the condition of that account.' Does that report you correctly?

A. Yes, sir.

Q. Now, did you ever know Mr. Porterfield to issue an order of that sort with reference to any account except Dobbins & Dazy?

A. No, sir, I don't know that I did. I think it is proper to state why I thought he did it.

Q. You say; 'they were buying and selling large amounts of cotton and the deposits from them were in the nature of drafts or exchange bills as they are sometimes called, drawn upon New York, and deposited for that account, and they had a right to check against it at once for the money or currency if necessary and it was necessary in order to get this information to be posted almost hourly in order that he might know what was going against him through the exchange, what checks were coming, so that he might get out, if necessary, and sell exchange on New York in order to
92 meet these things, these demands of Dobbins & Dazy.' Is that the reason?

A. That is my recollection of what I stated.

Q. Now, if these checks had been brought back to Mr. Porterfield after they had been certified by the teller, could he not have kept up with the account just as well as if they had been brought back before they were certified?

A. I think he could, sir, but I think those young men testified that they went back to Mr. Porterfield and did not go to the teller, these messengers from the banks.

Q. Well, then, if Dobbins & Dazy had the money to their credit in the bank when these checks were presented why would it not have been proper for the teller to have certified the checks and then report it?

A. I did not say that it would have been improper.

Q. Would not that have been the proper way to do the business?

A. I only know about the Dobbins & Dazy account what Mr. Porterfield told me. He gave me reasons that seemed to be satisfactory. I knew something about meeting those accounts that came

through that exchange hour or the settlements; in fact, I know he several times called on me to go out and assist him in selling that exchange.

Q. You were asked upon your original examination with reference to the certification of Dobbins & Dazy's checks, viz: My question is, whether you remember the particular circumstances of your marking all of them.

A. I was going to state that there was only one check there that I can remember specifically when I marked it good, and that is dated Dec. 17, 1892. It was brought about in this way; to my recollection Mr. Porterfield was out of the bank at the moment the check was presented to be marked 'Good' and I was standing at his desk when the young man, the messenger from the other bank, presented it to me. I had been out of the city for a number of days and had just got back and looked down the hallway as it is called and saw Mr. Porterfield and waited until he came up to me.

Q. Saw whom?

A. Saw Mr. Porterfield and waited a few moments until he came up to me and I said 'Is this check good?' and his reply was, very prompt, 'For that amount and more' and upon that assurance I marked it good and signed it as president. In regard to the other three, I have no distinct recollection as to the immediate surroundings.

Q. Now that happened to be the check you certified on that day for thirty-one thousand dollars when Dobbins & Dazy had not deposited anything at all in the bank is it not, Mr. Spurr?

93 A. I do not remember, sir, whether they deposited anything at all on that day or not.

Q. Look at the ledger there on December 17, 1892.

A. No, sir; there is nothing deposited on the 17th as the books show.

Q. And that is the check you remember so particularly about?

A. Yes, sir; but according to the developments here the deposits on the 19th might have been put into the bank on that day.

Q. But the ledger does not show any deposit on that date.

A. No, sir. Anything coming after two o'clock would not be entered until the following day, and Sunday came in between the 17th and 19th.

Q. Look at December 16th, and tell the jury how much Dobbins & Dazy were overdrawn the day before you certified that check?

A. $19,503.

Q. Now, look on December 17th, how did the account stand?

A. Overdrawn, $51,072.65.

Q. That is the day you certified that check for $31,000?

A. Yes, sir.

Q. Now turn to December 9, 1892, and see how much they were overdrawn on December 8th, the day before?

A. $114,194.01.

Q. That is at the close of business on the 8th, and on Dec. 9th, you certified a check for them for fifteen thousand dollars?

A. Yes, sir.

Q. How much were they overdrawn at the close of business on December 9th?

A. $64,417.97.

Q. Do you remember where you were standing when you certified that check?

A. No, sir.

Q. You don't remember whether you were standing at your desk or not?

A. No, sir; I don't remember whether standing or sitting.

Q. Had you been out of the city a number of days before you certified that check?

A. No, sir.

Q. Did you look down the hallway that day before certifying that check?

A. No, sir; I did not.

Q. Did you wait until Mr. Porterfield came up to you be-
94 fore you certified it?

A. I did not, sir.

Q. Now turn to January 2, 1893, of Dobbins & Dazy's account and tell the jury how much it was overdrawn at the close of business on January 2d?

A. January 2d, is not here.

Q. Then the first day before that?

A. December 31st, overdrawn, $47,223.09.

Q. Then on January 3d, you certified a check for forty thousand dollars?

A. I think that is the amount.

Q. Mr. Spurr, look back there and see if on the 31st of Dec. the overdraft was not $77,515.59.

A. That was the beginning of that day. At the close of business it was $77,515.59.

Q. What was the overdraft at the close of business on January 3d, the day you certified the check?

A. $38,125.84.

Q. Now turn to Feb. 12, 1893, and state to the jury how the account stood at the close of business on that day?

A. February 12th, does not appear here.

Q. Well, the first day before that.

A. The 11th?

Q. Yes, sir.

A. The account was overdrawn $49,454.69.

Q. Now, on the next day, February 13th, you certified a check for $9,641.95, did you not?

A. The 13th?

Q. Yes, sir.

A. I cannot say that I recollect the dates, about that.

Q. What was the overdraft of Dobbins & Dazy at the close of business, February 13th?

A. $68,243.73.

Q. Was Porterfield standing at his desk when that check was

brought, or were you standing at Porterfield's desk when that check was brought to you?

A. I don't know where I was standing.

Q. Had you been out of the city for a number of days before that check was brought to you?

A. No, sir; I don't think I had been away from home at that time.

Q. Did you look down the hallway that time?

A. I don't know, I may have done so.

Q. Well, did you wait until Mr. Porterfield came to you before you certified the check?

A. No, sir; I don't think I did."

Defendant also testified on direct examination, in substance,
95 that he had nothing to do with receiving, discounting or handling the New York drafts deposited by Dobbins & Dazy in the Commercial national bank, and did not remember ever to have seen one of them; and thereafter he was cross-examined by counsel for the plaintiff on this subject as follows:

"Q. Do I understand you to say on your original examination that these drafts Dobbins & Dazy were depositing in the Commercial national bank, as cash, you never saw any of them?

A. No, sir, I have no recollection of having seen any of them.

Q. And you thought all of them had bills of lading attached?

A. Yes, sir, that is what I believed, that they represented actual purchases of cotton and that was the understanding from the beginning as to what their business would be and how it would be conducted.

Q. You stated on your original examination, that on July 11, 1892, you telegraphed the National Bank of the Republic at the request of Dobbins & Dazy, to hold up on a draft for $15,000, dated July 8, 1892, that had been deposited by Dobbins & Dazy in your bank?

A. Yes, sir, that reminds me that such a thing was done.

Q. You thought that draft had bills of lading attached to it?

A. I had no reason to question it, that there was—the question did not enter my mind. It was simply a request that it be held up.

Q. Did you ever know of a party requesting a draft to be held up with bills of lading attached?

A. I never knew it but I was told it was a very common occurrence; I never had any experience in handling a cotton account and those things never came under my observation, but I had always heard there were difficulties and delays and protests and all that sort of thing.

Q. I understood you to say that you had no recollection that you had ever seen any of those drafts?

A. That is my recollection.

Q. I will ask you if you did not say on May 29, 1894, in this room, as follows, in answer to this question:

'Did you receive or see any of these pieces of exchange discounted, received and placed to the credit of Dobbins & Dazy by the bank,

mentioned in these questions? A. I did not. It was a matter that never came before me, but I have seen them in the hands of the exchange clerk and frequently asked him about their depositing exchange.'

96 A. I don't recollect it, sir; but I may have said it. My recollection is that they were never brought to my attention, that there was anything missing or irregular about Dobbins & Dazy's account. I am positive about that."

And thereafter the defendant called and proposed to examine witnesses as to defendant's good character, and defendant's counsel having asked a witness, Mr. John Overton, preliminary questions touching his age and residence, and the witness having stated his acquaintance with defendant for about thirty years, the following proceedings were had:

"Q. Do you know his general character and reputation in this community during that period for honesty and integrity and truth and veracity?

A. I do, sir.

Mr. BAXTER: The Government insists that the question ought to be divided. As to his reputation for honesty and integrity, it ought to be confined to the filing of the indictments, at least to the time of the charge in this case.

Mr. PITTS: If your honor please, we insist upon our right to put Major Spurr's character in issue, both for honesty and integrity and truth and veracity during the entire period that he had lived in Nashville up to the time of this investigation and subsequent thereto.

The COURT: The question now is, not your right to put the defendant's character in issue, but as to the time in which you can prove his general character. I have no doubt, but he has the right to put his general character in issue, but the question now inquired into is as to the time of the limitations within which it can be done. The rule which allows the defendant to offer proof of his character, is based upon the presumption that a man who has a good character would not commit the offense with which he is charged, and of course, as the inquiry is in reference to a question of fact, whether he did do that thing or not; but I think the time to which the testimony should relate in regard to his good character should also have reference to that time. Now, there is a very important reason, counsel must see, if they reflect upon it, for limiting the inquiry to that time. If we were to bring the time down to the present, it would be liable to embarrass the jury and to turn their minds from the real merits of the case and put before them opinions which ought to be kept as far from the jury as possible. If we come down to the present we would proceed to launch ourselves upon an inquiry as to what the people of the community thought of the case at present and as to whether the defendant's reputation stood un-

97 tarnished since this transaction or since his arrest. Now, I am quite clearly of the opinion that you are entitled to ask this witness questions showing the length of time of his acquaint-

ance, his familiarity with the defendant and his means of knowledge of the general character which the defendant has sustained in the community up to the time of the transactions, and then ask him what that character was, if the preceding questions have shown he is sufficiently competent to testify on that subject. With respect to the other question in the case, that is, the respondent's character for truth and veracity, I am not satisfied that you have a right to go into that question generally, unless his character has been attacked by the evidence on that subject.

Mr. PITTS: I would like to submit to your honor some authorities and be permitted to say something on that branch of the case.

The COURT: Very well, I will reserve that question if you think you can convince the court of the error of his ruling, but I will overrule in respect to the first one in regard to the defendant's character, that you are limited to the time when these transactions occurred.

Mr. PITTS: I think it is proper to state to your honor what I expect to prove by these witnesses.

The COURT: I understand what you expect to prove and I overrule that proposition.

Exception taken for the defendant.

Q. Now, Col. Overton, I understand you to say you had known his general character?

A. Yes, sir.

Q. What was that general character down to the time, as the court has limited me, to this charge against him?

A. I think it was good, sir.

Q. Now, do you know what his general character in this community, up to this time, has been for truth and veracity?

Objected to.

The question as to the admissibility of this evidence was argued by counsel, and the court stated that the evidence would only be permitted as to the character of the witness up to the time of the failure of the bank, and that after an examination of the question, the court would announce tomorrow morning whether or not the other part of the evidence offered would be admitted."

Other witnesses were then examined under the same ruling and limitation—counsel stating to the court that he wished to ask all of them as to the character of defendant for truth and veracity
98 during their entire acquaintance with him down to the present time, also that he wished to ask them as to his character for honesty and integrity during the same period; and that he expected to prove by all of the witnesses that his character was good in both respects.

The court upon statement of the district attorney that the Government admitted defendant's good character for honesty and integrity down to the period of the charge of the indictment, limited defendant to ten witnesses as to character; and that number was examined under the above ruling and limitation, embracing farm-

ers, merchants, physicians, mechanics, and State and county officials.

On the morning succeeding the argument of the question, the court announced its adherence to the ruling above stated, and to this ruling the defendant excepted.

Defendant's insistence was, that defendant had been attacked as a witness and his testimony impeached by the substance and manner of his cross-examination by counsel for the plaintiff, which had shown a purpose to argue to the jury that he had not testified honestly and conscientiously, but had testified falsely; but the court, without determining this question, based its ruling upon the fact that there had been no attack of defendant as a witness by evidence of bad character; and held that there having been no proof offered by the plaintiff, of defendant's bad character as a witness, no proof of his good character for truth and veracity could be offered by the defense.

In the subsequent argument of the case before the jury, counsel for plaintiff argued and insisted that defendant had not testified truthfully and that his testimony was unreasonable and not worthy of belief; and on this subject, the court, in the charge to the jury said:

"Nevertheless, he (referring to defendant) testified that he did not know that Dobbins & Dazy's account was overdrawn when he certified these checks, or any of them, or that there was a lack of funds in the bank to pay them, and that he had no reason for supposing this account to be overdrawn or that there was too small a sum to their credit to meet them.

Gentlemen, do you think this is true? It is for you to say, and as you are responsible for the answer, I shall do no more than challenge your serious attention to the evidence in the case touching this question."

Defendant tenders this his bill of exceptions, which he prays may be signed, sealed and made part of the record in the
99 cause, and it is accordingly done, this 13th day of February, 1897.

(Signed) H. F. SEVERENS,
U. S. Judge, Acting under Designation.

We agree that the foregoing bill of exceptions is correct.

(Signed) TULLY BROWN, *U. S. Att'y.*
ED. BAXTER,
Special Ass't to U. S. Att'y.
PITTS & MEEKS,
Att'ys for Def't.

I, H. M. Doak, clerk of the United States circuit court in and for the middle district of Tennessee, do hereby certify that the foregoing is a true, full and perfect transcript of the record and proceedings in the case of The United States *versus* Marcus A. Spurr, No. 7994 consolidated, as the same appears and remains of record and on file in my office.

In witness whereof I have signed my name and affixed the seal of said court at office in Nashville, this the 29th day of March, A. D. one thousand eight hundred and ninety-seven, and of the Independence of the United States the 121st year.

H. M. DOAK, *Clerk*,
[SEAL.] By E. L. DOAK,
Deputy Clerk.

100 And afterwards, to wit, on April 8th, 1897, a petition was filed in said cause in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

MARCUS A. SPURR, Plaintiff in Error,
v.
THE UNITED STATES, Defendant in Error.

Petition of Marcus A. Spurr.

To the honorable the judges of the United States circuit court of appeals for the sixth circuit, sitting at Cincinnati:

Humbly complaining, your petitioner, Marcus A. Spurr, plaintiff in error in the above-entitled cause, respectfully shows:

1. That he has been convicted and sentenced to two and one-half years' imprisonment in the penitentiary, in the above-entitled cause, heretofore in the circuit court of the United States for the middle district of Tennessee, upon a charge of willfully certifying falsely a certain check drawn upon the Commercial National Bank of Nashville, Tennessee, whilst he was president thereof.

2. That petitioner is not guilty of said offense; that he is advised that there are manifest errors in the record and proceedings upon which his said conviction and sentence are based; and that he has heretofore sued out and obtained a writ of error in due course, to have the said conviction and sentence reviewed and reversed by this honorable court, and has lately, on the 30th of March, 1897, caused to be filed with the clerk a full transcript of the record and proceedings in said circuit court, duly authenticated, and a statement of docket fee, to cover clerk's costs, and of an estimate of the cost of printing the said record has been made and furnished the attorneys of petitioner, by the clerk, which is herewith filed as a part thereof, marked A.

3. That owing to his poverty petitioner is unable to pay the said docket fee and cost of printing the record, that he verily believes that justice requires that said record should be printed, and he herewith files a statement of Hon. Tully Brown, United States district attorney for the middle district of Tennessee, bearing on the subject, marked B, as a part of this petition.

101 Petitioner prays the honorable court to grant an order directing that the cause be docketed for trial and that the record be printed at public expense..

Petitioner makes no question upon the two trials of the cause, one

before Hon. Geo. R. Sage, and the other before Hon. Wm. H. Taft, each resulting in a mistrial, and is willing that such portions of the transcript as relate to those trials be omitted from the printed record; and petitioner will ever pray, etc.

MARCUS A. SPURR, *Petitioner.*

PITTS & MEEKS, *Attorneys.*

Personally appeared before me, H. M. Doak, clerk and commissioner of the United States circuit court for the middle district of Tennessee, Marcus A. Spurr, the above petitioner, and made oath that the above petition is true to the best of his knowledge and belief.

H. M. DOAK, *Clerk.*

EXHIBIT "A."

United States Circuit Court of Appeals for the Sixth Circuit.

Clerk's office; Frank O. Loveland, clerk.

CINCINNATI, *Mar.* 30.

Messrs. Pitts & Meeks, Nashville, Tenn.

GENTLEMEN: The transcript of the record from the circuit court of the United States for the middle district of Tennessee in the case of Marcus A. Spurr *vs.* The United States, in which your name appears as counsel for the —— —— is received. Before the case can be docketed a fee of $35.00 must be paid and appearance of counsel docketing the case entered. Please give this immediate attention. Enclosed find appearance, which kindly sign and return to me.

Records must be printed under the supervision of the clerk, and the estimated cost thereof deposited with him within ten days from the date of this notice.

The estimate for printing in the above case is $160.00.

Very truly yours, FRANK O. LOVELAND, *Clerk.*

102 "The clerk shall supervise the printing of all records, and upon the docketing of a case, shall forthwith cause an estimate to be made of the cost of printing the record and his fees for preparing it for the printer and for supervising the printing thereof, and shall at once notify the attorney for the plaintiff in error, or appellant, of the amount of such estimate, which shall be paid to the clerk within ten days after such notice. If not so paid the writ of error, or appeal, may be dismissed upon the motion of the opposite party or by the court of its own motion."—Rule 23, sec. 1.

EXHIBIT "B."

From the Circuit Court of the United States for the Middle District of Tennessee.

MARCUS A. SPURR, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error.

This is a conviction and sentence of imprisonment of the plaintiff in error for willful false certification of checks while president of a national bank. It is a case of importance, involving many questions, and the record is one which, in my judgment, ought to be printed.

TULLY BROWN,
U. S. District Attorney.

And afterwards, to wit, on May 4th, 1897, an order was entered in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

MARCUS A. SPURR
v.
THE UNITED STATES.

Motion to print*ed* record herein at public expense was argued by Mr. Pitts in behalf of the appellant and is submitted to the court for its order.

103 And afterwards, to wit, on May 24th, 1897, an order was entered in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

MARCUS A. SPURR
v.
THE UNITED STATES.

The motion herein to print the record at public expense is hereby denied.

And afterwards, to wit, on November 15th, 1897, an order was entered upon the journal of said court in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

MARCUS A. SPURR
v.
THE UNITED STATES.

Error to the circuit court of the United States for the middle district of Tennessee. Before Judges Barr, Ricks, and Swan.

This cause came on to be heard this day and was argued by Mr. John A. Pitts and Mr. B. P. Waggener for the plaintiff in error and by Mr. Ed. Baxter for the defendants in error and the hearing is continued until tomorrow.

104 And afterwards, to wit, on November 16th, 1897, an order was entered in said cause which order reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

MARCUS A. SPURR
v.
THE UNITED STATES.

Error to the circuit court of the United States for the middle district of Tennessee. Before Judges Barr, Ricks, and Swan.

This cause came on this day to be further heard and was argued by Mr. Ed Baxter for the appellees and by Mr. B. P. Waggener for the appellant and is submitted to the court for judgment.

And afterwards, to wit, on June 1st, 1898, a judgment was entered in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

MARCUS A. SPURR
v.
THE UNITED STATES.

Error to the circuit court of the United States for the middle district of Tennessee.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the middle district of Tennessee and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be and the same is hereby affirmed and the cause is remanded to the circuit court of the United States for the middle district of Tennessee for such proceedings therein as may be in con-
105 formity with the judgment and opinion of this court and that the mandate of this court issue accordingly.

And afterwards, to wit, on June 1st, 1898, an opinion was filed in said cause, which is in the words and figures as follows:

Opinion.

United States Circuit Court of Appeals, Sixth Circuit.

MARCUS A. SPURR, Plaintiff in Error,
vs.
UNITED STATES, Defendant in Error. } No. 502.

Error to the circuit court of the United States for the middle district of Tennessee.

Submitted November 16, 1897; decided June 1, 1898.

Before District Judges Barr, Ricks, and Swan.

Three indictments were found against the defendant, each of which contained several counts, for violation of section 5208 of the Revised Statutes, by which it is provided: "It shall be unlawful for any officer, clerk or agent or any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check." By section 13 of the act of Congress, approved July 12, 1882, it is enacted as follows: "That any officer, clerk or agent or any national banking association who shall willfully violate the provisions of an act entitled: 'An act in reference to certifying checks by national banks,' approved March 3, 1869, being section 5208 of the Revised Statutes of the United States, or who shall resort to any device or receive any fictitious obligation, direct or collateral, in order to avoid the provisions thereof, or who shall certify checks before the amount thereof shall have been
106 regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty of a misdemeanor and shall, on conviction thereof in any circuit or district court of the United States, be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, in the discretion of the court." The three indictments found against the defendant were consolidated and tried together. The several counts of the indictments *mutatis mutandis* charge that: "He, the said Marcus A. Spurr, being then an officer, to wit, the president of said the Commercial national bank, did willfully violate the provisions of section 5208, United States Revised Statutes, and did, without the consent of the bank, its board of directors and committees, willfully, unlawfully and knowingly certify a check drawn upon said the Commercial national bank by said company, to wit, the said Dobbins & Dazey, they, the said Dobbins & Dazey, as he, the said Marcus A. Spurr, well knew not having at said time on deposit with the said the Commercial national bank, an amount of money equal to the amount specified in said check, etc." The sev-

eral counts of the consolidated indictments charged the certification by defendant of four checks drawn by Dobbins & Dazey, between December 9, 1892, and February 13, 1893, both inclusive, on the Commercial national bank, of Nashville, Tennessee, aggregating $95,641.95. The total amount of checks of Dobbins & Dazey certified by defendant, between said dates, was $110,366.54.

The Commercial national bank was organized in 1884. Defendant was president, and F. Porterfield was cashier from its organization to its failure, March 25, 1893. The original capital stock of the bank was $200,000, which was increased from time to time to $500,000. The firm of Dobbins & Dazey was engaged in the purchase, sale and exportation of cotton. Its financial standing and credit was excellent, but its assets consisted only of money, choses in action and cotton on hand and in transit. On December 9, 1892, at the close of business, the individual ledger of the bank showed that Dobbins & Dazey's account was overdrawn in the sum of $64,417.97, and on that date the defendant certified that firm's check for $15,000. At the close of business December 17, 1892, Dobbins & Dazey's account was overdrawn in the sum of $51,070.65, and on that day their check for $31,000 was certified by defendant. At the close of business January 2, 1893, Dobbins & Dazey's account was overdrawn $77,515.59, and at the close of business the next day, $38,125.84, on which day defendant certified their check for $40,000. At the close of business February 11, 1893, Dobbins & Dazey had overdrawn their account $49,454.59 (February 12th was a holiday), and at the close of business February 13, 1893, their account was overdrawn $68,243.73. On that day defendant certified their check for $9,641.95. The evidence on the part of the Government tended to show that the account of Dobbins & Dazey was continuously and largely overdrawn upon the individual ledger during the period covered by the checks certified by defendant (except one day in January, 1893, when there was a small credit balance), and that this fact was known to Porterfield, the cashier, and all the employés of the bank under him in authority.

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The board of directors of the bank consisted of twenty-one members. It had two standing committees, known as the executive committee (of which defendant was a member), whose duties were prescribed by by-law 17, and an examining committee, with the powers and duties prescribed by by-law 28.

By-law 17 empowered the executive committee to discount and purchase bills, notes and other evidences of debt, and to buy and sell bills of exchange, and required them to report at each regular meeting of the board of directors all bills, notes and other evidences of debt purchased by them since their last regular report. By-law 28 made it the duty of the examining committee to examine, four times a year, or oftener, the affairs of the bank, count its cash, compare the assets with the accounts of the general ledger and ascertain if these and all other accounts were correctly kept, and whether the bank's condition corresponded therewith, and whether the bank was in a sound and solvent condition, etc., and report the result of their

examination at the next regular meeting of the board. Under by-law 8, the cashier was primarily responsible for all funds, property and valuables of the bank. Under by-law 9, the president was responsible only for such funds, property and valuables of the bank which should come into his hands as president.

Both officers were required under these by-laws, respectively, to give security for the faithful and honest discharge of their respective duties. By-law 19 provided: "That no officer or clerk of this bank shall pay any check drawn upon it or pay out money on any order unless the drawer of such check or order shall, at the time of
108 the presentation thereof, have deposited in the bank, sufficient funds to meet such check or order."

There was evidence tending to show that defendant had access to the books of the bank, and that he frequently made inquiries of the clerks and book-keepers concerning various matters and accounts. The only direct testimony that defendant was informed of the state of that account, at the dates of the certifications, was that of Porterfield, the cashier, who testified that between November 25, 1892, and the failure of the bank, March 25, '93, he apprised defendant that Dobbins & Dazey's account was continuously and largely overdrawn. Evidence was also received—as indicating defendant's knowledge of the state of Dobbins & Dazey's account—that defendant and Porterfield, the cashier, were each engaged in speculation in cotton futures through Dobbins & Dazey during the period covered by the dates of the checks certified by defendant, and that Porterfield was so engaged without furnishing any margins, and that the funds of the bank were used by Dobbins & Dazey in such speculations without the knowledge of defendant. The evidence upon these points was conflicting. Defendant was also sworn as a witness in his own behalf.

For the purpose of establishing defendant's knowledge and intent, evidence was admitted to show that in 1886 and 1887, Porterfield, with defendant's knowledge, but without the consent or knowledge of the bank, its directors or committee, used a large amount of the funds and moneys of the bank in the purchase on speculation of stocks for the joint account of himself and defendant, and other persons, in the name of the bank or in his (Porterfield's) name as cashier. For the same purpose, evidence was also admitted bearing on two other accounts, one opened March 12, 1889, with Herzfeld & Co., New York city, in the name of "Frank Porterfield," separate, and the other opened October 3, 1889, with Latham, Alexander & Co. of New York city, in the name of Porterfield & Spurr, both of which were continued down to the close of the bank in 1893, and that the defendant and Porterfield were jointly interested in the speculations indicated by those accounts during the entire period of their existence; that numerous purchases and sales of stocks, bonds and other funds were made by them for their joint benefit on those accounts, and that large sums of the moneys and funds of the bank were used by Porterfield without securing or reimbursing the bank in such purchases, with the knowledge and consent of defendant after the accounts had been running some time, (not when

they were opened.) There was also evidence that defend-
109 ant and another director objected to opening an account with Dobbins & Dazey, on the ground that their business was understood to be large and would require the bank to provide cash to meet the checks of the firm on eastern drafts, secured by bills of lading for cotton, and the bank might not always be able to provide sufficient funds to carry the account. Dudley, the director who shared Spurr's objections to receiving the account, had been in the cotton business, and stated at the directors' meeting that Dobbins & Dazey would be likely to overdraw their account; that when the account was accepted, the cashier was instructed by the committee in defendant's presence not to allow Dobbins & Dazey to overdraw their account, nor to borrow more than their line of credit, which was $30,000, and not to discount their drafts without bills of lading attached; and the cashier promised obedience to the order and reported to Dudley several times that the account was profitable and satisfactory; that the committee understood and believed that the cashier was obeying his instructions; that the members of both committees and the directors had no information, before March 25, 1893, that Dobbins & Dazey's account was overdrawn, or that they were depositing and discounting or had deposited or discounted, eastern drafts, without bills of lading attached; that the directors and committee did not regard it as their duty to examine depositors' ledger accounts or the drafts deposited by them; that prior to and during the period covered by the dates of the checks certified by defendant Dazey, one of the firm of Dobbins & Dazey, was conducting a system of what is known among bankers as "kiting" between Nashville and New York; that is, he would draw in the firm name large drafts on John Moore & Co., and Latham, Alexander & Co., bankers and brokers, the New York correspondents of Dobbins & Dazey, and deposit and discount such drafts without bills of lading attached, and take credit for the proceeds as cash on the account of Dobbins & Dazey in one or the other of the two banks of Nashville, in which they carried regular accounts, viz, the Commercial national bank or the First national bank; Dazey would then draw in his firm's name checks on one of these banks, generally in favor of the Fourth National Bank of Nashville, but sometimes on another bank. These checks were then certified by the Commercial national bank or the First national bank, whereupon the Fourth national or the American national bank would transmit to New York, by wire, the money to meet Dobbins & Dazey's drafts maturing
110 in New York, and the latter banks would collect the amount of the checks from the Commercial national or the First national bank, as the case might be. Dazey would then draw another set of drafts in Dobbins & Dazey's name, without bills of lading attached, on the same drawees in New York, and take credit for their proceeds as cash in the Commercial national or First national bank. He would then draw a second set of checks on the Commercial national bank or the First national bank in favor of the Fourth national bank or the American national bank, and these would be certified by the Commercial or the First national bank. The Fourth national

bank or the American national bank would transmit the necessary amount by wire to New York to meet the second set of drafts, and would again reimburse themselves by collecting the several sets of checks from the certifying banks. When these drafts were drawn by Dazey, his firm was largely overdrawn with the drawees. This process was repeated again and again for nearly six months preceding the failure of the Commercial national bank, during which time said bank received and entered as cash Dobbins & Dazey's drafts for $1,829,427.25, which had no bills of lading attached, and at the bank's failure, March 28, 1893, it had on hand Dobbins & Dazey's drafts of this kind to the amount of $142,000, which had been discounted and credited to the drawers by the Commercial national bank, February 27, 1893.

The jury found the defendant guilty upon certain counts of the consolidated indictments. Motions in arrest of judgment and for a new trial were overruled and the defendant was sentenced to be imprisoned for two years and six months upon three counts of the consolidated indictments, based on the checks certified by the defendant, January 3, 1893. To reverse this judgment, the defendant brought this writ of error.

SWAN, district judge, delivered the opinion of the court:

The errors assigned and relied upon are nineteen in number. Some of these present questions dependent upon the same principles as others and will not be separately discussed.

The first assignment is predicated upon the following excerpt from the charge of the court, viz: It was the defendant's duty, before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn. From the existence of such a duty, you may draw an inference of fact
111 that he did so inform himself; if he did not already know it. But the presumption of knowledge is not an absolute one, and the defendant may show, if he can, that he did not in fact acquire information of the truth." In the next sentence of the charge, the jury were instructed: "And in general, if the defendant acted in good faith in making these certifications, believing that the state of the account of Dobbins & Dazey justified it, he was not guilty of the offense charged. Mere negligence or carelessness unaccompanied by bad faith, would not render him guilty."

The learned judge had previously instructed the jury that the checks had become the obligations of the Commercial national bank solely by defendant's certification. The facts of certification by defendant, as president, and that Dobbins & Dazey had no funds in the bank at the times of the certification, were admitted. The only question of fact, therefore, left for determination, it is admitted, were the defendant's knowledge of the state of Dobbins & Dazey's account when the checks were certified, and his purpose or intent in the certifications. The instruction criticised did not inform the jury that the effect of the legal presumption was to shift the burden of proof to defendant to negative the inference of fact, but was permissive merely and left the jury free to determine, upon all the evidecne in

the case, whether, notwithstanding the inference derivable from the existence of the duty, the defendant had that knowledge of the account, which the court, elsewhere in its charge, made a necessary element of the offense. Defendant's legal duty, as an officer of the bank, to be informed, was *prima facie* evidence of his performance of that duty.

Knickerbocker Life Ins. Co. *v.* Pendleton, 115 U. S., 339, 347.
Finn *v.* Brown, 142 U. S., 71.

This was all the effect given it by the instruction in question. The case of Agnew *v.* The United States, 165 U. S., 36, 49, approved an instruction that an inference or presumption of an unlawful intent throws the burden of proof on defendant.

There was other evidence, direct and circumstantial, tending to show that defendant knew or had reason to believe, at the times of certification of the checks, that the account of Dobbins & Dazey was largely overdrawn. The case, therefore, was not committed to the jury solely upon the inference predicated upon defendant's official position that he had discharged the duty it devolved upon him before the acts of certification; but the jury were explicitly
112 instructed that the Government must establish the defendant's knowledge of the state of the Dobbins & Dazey account beyond a reasonable doubt, in order to maintain any of the counts in the indictment. Nor did the last sentence of the charge covered by this assignment put upon defendant the disproof of knowledge of the account in question. Referring to the inference of knowledge, the court added: "But the presumption of knowledge is not an absolute one, and the defendant may show, if he can, that he did not, in fact, acquire information of the truth." This certainly deprived that presumption of any controlling influence, in the minds of the jury, against the defendant, and emphasized its rebuttable nature. But even if a hypercritical construction, adverse to the defendant, could be extracted from this passage of the charge standing by itself, it is manifest that its connection with other parts of the charge clearly negatives any argument based upon this isolated sentence.

II. The modification of defendant's third, and the refusal of his seventh request for instructions, were justified by the fact that both were pervaded by the common error that they singled out particular circumstances, omitted all reference to others of importance, and sought to confine the jury to the matters narrated, thus excluding other evidence which the jury might have decreed important. Both were calculated to mislead the jury, and were argumentative.

Grand Trunk R'y *v.* Ives, 144 U. S., 433.
Rio Grande R'y *v.* Look, 163 U. S., 280.
Agnew *v.* U. S, 165 U. S., 51.
Catts *v.* Phalen, 2 How., 382.

III. The fourth request of defendant was properly refused. It not only prayed for an instruction on the weight of conflicting evidence, but also for a direction to the jury to disregard presumptive

proof on the assumption that it was rebutted by other matters of fact. It was no part of the duty of the court to decide upon the relative force of the facts.

Crane *v.* Morris, lessee, 6 Peters, 598, 616–'17.
Lilienthel's Tobacco Co. *v.* U. S., 97 U. S., 237, 268.
Kelly *v.* Jackson, 6 Peters, 622.

IV. The refusals of the defendant's sixth and ninth requests were also proper. Both were fully covered by the charge given. The court instructed the jury: "The Government is bound, in order to maintain any of the counts in the indictment, to prove * * * 3d: That the defendant knew that there were no funds of the drawer in the bank sufficient to meet them (the checks)."
113 Again: "You must be satisfied from the proof, beyond a reasonable doubt, of every fact essential to the guilt of the defendant, of the specific charges contained in the indictment before you will be warranted in convicting him." * * * "The facts which are charged as constituting guilt must be so proven as to persuade a clear and abiding conviction of defendant's guilt, such conviction as is not shaken by any reasonable doubt grounded upon the testimony. If you are so convinced of his guilt, he should be convicted; otherwise, not." The remainder of the sixth request was also fully covered by the following passages in the charge: "Knowledge of the defendant of the state of Dobbins & Dazey's account, when he certified the checks, is thus made the pivotal question in the case. Upon this question of knowledge, the court charges you that it is not necessary for the Government to show that the defendant knew of the lack of funds of Dobbins & Dazey, from an actual examination of the books of the bank or from any inquiries made at that time. If the defendant knew that he had good reason for believing Dobbins & Dazey's account to be overdrawn, and refrained from making such inquiry for the reason that he knew of the condition of the account, or because he was purposed to certify the check without reference to whether there were funds sufficient to meet it or not, that is sufficient. That is to say, if he shut his eyes to what he believed was the fact, and kept himself in ignorance of the state of the account because he believed an examination would disclose the facts, this would be equivalent to express knowledge. Nor is it necessary to prove that the defendant knew just what was the extent of the overdraft on Dobbins & Dazey's account, or of the lack of funds to meet the checks. If he knew of the substance of the fact that Dobbins & Dazey had not funds to meet their checks, and that there was no warrant for marking the checks good, that was sufficient." This correctly states the law. The Government was not bound to show defendant "actually knew" that Dobbins & Dazey had no funds in the bank. The judge further said: "And, in general, if the defendant acted in good faith in making these certifications, believing that the state of account of the Dobbins & Dazey justified it, he is not guilty of the offense charged. Mere negligence or carelessness unaccompanied by bad faith would not render him

guilty." Again: "If the proof fails to satisfy your minds clearly and beyond a reasonable doubt that the defendant did actually know, at the time he certified the checks mentioned in the
114 indictment, that Dobbins & Dazey did not have on deposit in the bank sufficient funds and credits to meet the checks so certified, then you should acquit him, unless you are convinced by the proof beyond a reasonable doubt that he willfully, designedly and in bad faith—these words mean substantially the same thing—shut his eyes to the facts and purposely refrained from inquiry and investigation for the purpose of avoiding knowledge."

4. The modification of defendant's 2d request affords no just cause of complaint. The request recited the respective duties of the president and cashier of the bank as apportioned under by-laws 8 and 9, and the jury were instructed, as prayed, "these two by-laws taken together mean and imply that the cashier is primarily responsible for all the funds, property and valuables of the bank, and that the president is responsible only for such funds, property and valuables of the bank that may be placed in his hands as president, and that both of these officers are each to faithfully and honestly discharge their respective duties." The court then added: "But I further charge you that the president is a general officer of the bank, and it is admitted that he had authority, notwithstanding these by-laws, * * * to certify checks; and when the president assumes to certify these checks as good, the faithful and honest discharge of his duties required him to be informed of the condition of the account on which they were drawn." Without this modification, the instruction prayed would have been misleading, and would have given the jury to understand that by-laws 8 and 9 alone were the measure of defendant's official duty in dealing with the funds of the bank by certification of checks, and that under those the primary responsibility of the cashier for such funds and property, would relieve the defendant, as president, from civil and criminal responsibility under Revised Statutes, section 5008 and section 13 of the act of July 12, 1882. These statutes, by necessary implication, impose upon the certifying officer the duty of knowledge of the state of the account before certification of checks drawn upon it. This duty could not be abrogated by by-laws of the bank, or any division of duties between its officers. Nor was it the purpose of these by-laws to exempt the president, when he assumed to certify checks, from the statutory duty of knowledge. This is evident from the bank's by-law No. 19, which provided that, "no officer or clerk of this bank shall pay any check drawn upon it or pay out money on any order unless the drawer of such check or order shall,
115 at the time of the presentation thereof, have deposited in the bank funds sufficient to meet such check or order." By-laws 8 and 9 were, perhaps, properly called to the attention of the jury for their bearing upon the question of the intent with which defendant acted in the certifications.

Potter *vs.* U. S., 155 U. S., 447.

There is no substantial difference between the requirements of

these by-laws and the duties imposed by the statute and defendant's official oath required by section 5147, United States Revised Statutes. The defendant certainly could not complain that the adoption from the language of the request of the phrase "faithful and honest discharge of his duties" by the court was an expression of opinion on the facts. If it were, it would not have been an error, as the facts were left to the decision of the jury.

Simmons *v.* U. S., 142 U. S., 148.
Allis *v.* U. S., 155 U. S., 123.

VI. The court instructed the jury: "The Government is bound, in order to maintain any of the counts in this indictment, to prove, 1st: That the defendant certified the check; 2d: That the drawers of the check had not sufficient funds in the bank to meet such check; 3d: That the defendant knew that there were no funds of the drawer in the bank sufficient to meet them. This last element of the offense charged will be explained and its modification stated further on." It is argued that the jury were thus informed that the establishment of these three facts—the first two of which were conceded—would authorize conviction. This would be true if the instruction had been submitted as complete in itself upon the essentials of the crime, and as dispensing with the necessity of proof of the intent which accompanied the act of certification, but the last paragraph clearly excluded that view of its design and scope. Its promise was fulfilled in the passages in the charge quoted in our review of the sixth request. These, in connection with the extract criticised, defined fairly the essentials of the offense and the degree of proof required upon the questions of knowledge and intent. The court was not bound to adopt the language of the request.

Indianapolis R. R. Co. *v.* Horst, 93 U. S., 295.
Tucker *v.* U. S., 164 U. S., 164, 170.

Assignments 7 and 9. The 7th and 9th assignments are based upon defendant's 5th, and part of defendant's 7th request for instruction. The former was, in substance, that if the jury found that the account of Dobbins & Dazey, upon the books of the bank,
116 was overdrawn continuously during the period covered by the checks certified, and that the defendant certified the checks in ignorance of such overdraft, "believing at the time that the exchange deposited by Dobbins & Dazey, on the days on which such checks were certified, was sufficient to cover the amount of such checks (besides the overdraft then existing), then he is not guilty, and you should acquit him unless such ignorance was willful, as elsewhere explained in the court's instructions." The modification criticised consisted in adding the words inclosed in brackets. The subject had been fully treated in the charge, and the request should have been refused. Without the modification, it is clear that the instruction prayed would, if granted, have given the jury to understand that it was not necessary for defendant to have ascertained the state of the Dobbins & Dazey account before certifying the check, but it would be sufficient *per se* to acquit him if he be-

lieved that the amount of the exchange deposited—inclusive, necessarily, of the Kiting and other drafts made by that firm upon overdrawn accounts without bills of lading attached—equaled the checks certified. This would have been indirect conflict with that part of the charge presented by the first assignment, which we have approved, and would have nullified the statute which prohibits certification of checks "before the amount thereof shall have been regularly entered to the credit of the drawer upon the books of the banking association." The purpose of the modification was to preclude such a misconception of the defendant's duty, and to bring the request into harmony with the statute and the general charge definitive of that duty. The only lawful basis for certification is that prescribed by the statute, and the utmost effect that can be ascribed to the instruction as amended, was, that it required the defendant to act upon the state of the account, not merely upon his belief in the amount of the exchange deposited, leaving the jury free, however, under the general charge, to determine the intent with which the defendant acted. The pith of the instruction, as thus modified, was so fully covered by the extracts from the charge given in the examination of the 1st, 4th and 10th assignments of error, as to leave the defendant no ground of complaint against the amendment.

The court adopted part of defendant's 7th request, after modifying it so that it read: "If you find that in each instance, when he certified a check, the defendant had information from the cashier or exchange clerk upon which he relied in good faith, that a sufficient amount had been deposited that day and was in the bank to
117 cover the checks certified (I add: In addition to the existing overdraft), he would not be guilty under the indictment, and you should acquit him." The qualification of this request complained of is in the words in brackets. The reasons stated in the consideration of the 7th assignment of error approve the action of the court in making the same addition to this part of the charge.

Assignment 11. The eleventh assignment of error has nothing to sustain it. The jury returned into court after receiving the charge and asked the following question: "We want the law as to the certification of checks when no money appeared to the credit of the drawer." The court in response read the first paragraph of section 5208 of United States Revised Statutes, and asked the jury if that answered their question. The foreman responded "Yes." The court then read said paragraph a second time, remarking: "I read it again that you may all understand it." This action was excepted to on the ground that the court failed to read and explain section 13 of the act of July 12, 1882, imposing the penalty for the willful false certification of checks. The argument in support of this exception assumes that "what the jury wanted to know was the law applicable to this case * * * the law applicable to the criminal false certification" and therefore the court should have read section 13 of the act of July 12, 1882. It is also urged that the court gave the jury to understand that the certification of a check when there were no funds in bank to meet it, was sufficient to sus-

tain the indictment. The assumption is negatived by the answer of the jury. The court charged that to warrant conviction, the certification must have been willfully made, not merely false in fact. That distinction was emphasized in the following extract from the charge: "The question remains for you to settle upon all the evidence whether the defendant, Spurr, in certifying these checks acted in good faith and without any intent to do that which the law forbids, and which he must be presumed to know was unlawful, namely, the certifying of a check as good when the maker of it had no funds in the bank to meet it. If he acted in good faith, believing that the makers of the checks had funds in the banks to pay them, he should be acquitted. If he certified the checks either knowing that the funds to respond were not in the bank, and that the making of the check was unwarranted or having in his conscience good reason for believing that such was the fact, purposely refrained from inquiry, then the charge against him is made out. The facts which are charged as constituting his guilt must be proven beyond a reasonable
118 doubt." This was a full and fair exposition of the disputed elements of the offense charged. Other parts of the charge were equally explicit to the same effect, as we have shown elsewhere.

Assignment 12. Error is assigned on the admission of evidence of the stock transactions had through the bank or Porterfield as cashier, in 1886 and 1887. This was received "for its bearing upon the right of Spurr to rely upon Porterfield's representations upon the question of fact—whether he did rely upon any assumed correctness or honesty of action." Upon this question the Government offered evidence of purchases and sales of stock on the New York exchange, through certain brokers and dealers in stocks in New York in the name of Porterfield, cashier of the Commercial national bank, for the account of sundry customers of said bank, as well as Porterfield, R. S. Cowen, assistant cashier of said bank and defendant. These purchases and sales were made with funds of the bank remitted to New York by Porterfield, and embraced transactions from February 18, 1886, to January 15, 1887, both inclusive. The amount of the bank's money remitted by Porterfield to be used as margins in these transactions was over $66,000. The profits accruing to defendant from these ventures were credited to him on the books of the Commercial national bank at the times of the sales and afterwards were credited on his pass book and drawn out by him. There was also evidence that defendant accounted for the exact amount of losses shown upon the accounts, statements, tickets, slips and memoranda made out by Porterfield in reference to said transactions, and gave his notes to the bank with collateral security for his share of the losses but defendant never informed the executive committee of the bank or its directors that these notes were given to cover losses on stock speculations. There was evidence that the funds of the bank were thus used by the cashier with defendant's knowledge, but without that of the directors or committees of the bank. The evidence relied upon to show defendant's intent in certification of Dobbins & Dazey's checks was largely circumstantial. In such cases, a broad range of inquiry is permitted and when the

evidence tends even remotely to establish the ultimate fact, its admission will not be ground for reversal.

Clune *v.* U. S., 159 U. S., 593.
Alexander *v.* U. S., 138 U. S., 353.

Evidence of similar transactions to illustrate the character of the act in question has repeatedly been held competent in both
119 criminal and civil cases, and is often the only method of establishing the intent with which they were done.

Allis *v.* U. S., 155 U. S., 119.
Wood *v.* U. S., 16 Peters, 342.
U. S. *v.* Wood, 14 Peters, 230.
Taylor *v.* U. S., 3 How., 197–208.
Mudsill Mining Co. *v.* Watrous, 61 F. R., 163–179.

The objection that the collateral transactions were too remote is not tenable. It goes only to the weight of the testimony. The period of time within which the matter offered to establish the guilty purpose must have occurred to permit of their admission, is largely discretionary with the court.

Moore *v.* U. S., 150 U. S., 60.

In United States *v.* 36 Barrels of High Wines, 12 Int. Rev. Rec., 40–'1, Judge Woodruff said that for the purpose of showing the *quo animo* of an act under inquiry, he would not hesitate to admit evidence of acts running back to the enactment of the internal-revenue law, which had then been passed fully five years. Similar evidence was received in Coffin *v.* United States, 162 U. S., 67, for the same purpose. It is every day's practice to admit proof of this character to show intent on the trial of persons charged with counterfeiting. The evidence was properly received and its purpose carefully defined and limited in the charge of the court in accordance with the case last cited.

Assignments 13 and 14. The instruction which is the subject of this assignment and the refusal of defendant's thirteenth request, may be considered together. The first declared and the second conceded the illegality of speculation by a national bank or its officers in stocks and bonds upon margins. This was correct. The First National Bank *v.* The National Exchange Bank, 92 U. S., 128; California Bank *v.* Kennedy, 167 U. S., 362, 367. The court then told the jury that if Porterfield with Spurr's knowledge, was engaged in misusing the bank's funds and credits on cotton and stock exchanges in his own or the interest of others "the jury were at liberty to find in that a reason why Mr. Spurr should not have confidence in Porterfield's integrity and fidelity to the interests of the bank, and why Mr. Spurr would in the exercise of his own duties have exercised a closer scrutiny of the dealings of Dobbins & Dazey with the bank, especially if he had reason to suppose that firm was engaged in such speculations." We perceive nothing erroneous in this.

Preston *v.* Prather, 137 U. S., 605.

120 The request refused, would, if granted, have practically directed the jury that the confessedly illegal practices of the national banks of the city in receiving and executing orders for the purchase and sale of stocks and bonds on margins, if profitable, the receipt by stockholders of profits therefrom and the opinions of individuals engaged in like speculations, provided defendant had no reason to suspect the cashier of dishonesty in the conduct of such transactions and secured the bank against loss from the execution of his orders for such prohibited purchases and sales, could not and ought not to be given any weight against defendant, although the Commercial national bank did such business. This proposition is entirely untenable and is irreconcilable with the admission in evidence of those transactions which we have just approved. The evidence of the manner in which the defendant dealt or permitted others to deal with the funds of the bank having been properly admitted, its weight and effect was a question for the jury and not one of law for the court.

Assignment 15. The modification of defendant's tenth request was necessary to prevent the misleading of the jury. The court, at defendant's request, had told the jury in substance that if defendant certified the checks in good faith and honest reliance on the cashier's statement as to the Dobbins & Dazey account, his certifications would not be criminal. This followed immediately the clause modified, which read as presented "and if the cashier was reputed to be and believed by the defendant to be a man of honesty and truth, the defendant would have a right to rely upon his statements in regard to that account (Dobbins & Dazey's)." The court struck out the word "truth" and substituted therefor the words "right conduct as respects the affairs of the bank," and with this amendment granted the request. Whether or not defendant had a right to rely or in fact relied in good faith upon Porterfield's statements in reference to that account, was a question of fact to be determined, not alone by the cashier's reputation or by defendant's professed belief in his general truthfulness, but from all facts and circumstances known to defendant tending to approve or discredit the *bona fides* of his confidence in Porterfield's official conduct. Defendant was not prejudiced by this amendment, especially as the general charge covered the subject fully.

Assignment 16. The eleventh request to the effect that unless defendant knew or had reason to believe that the cashier "was
121 despoiling the bank and using its funds instead of his own" in his dealings in stocks and bonds and cotton futures, the fact that defendant knew that the cashier had dealt in those commodities, "would not deprive the defendant of the right to rely on his statements in respect to the affairs of the bank," was substantially granted, after substituting for the phrase "so despoiling the bank and using its funds" the words "had been using the funds or credits of the bank." There is no merit in the objection made to this change. It is mere verbal criticism. The substitution of the words "unlawfully in respect to its affairs" in place of the word "dishonestly" in the last paragraph of the request, making it read

" in order to deprive the defendant of the right to rely upon the cashier, it must be shown beyond a reasonable doubt that he knew the cashier was unfaithful to the bank and acted unlawfully in respect to its affairs," fully preserved the rights of defendant and was an impartial reference to all the evidence of defendant's knowledge of the cashier's transactions. The amendment was a synonym in substance of the adverb it displaced. The cashier could not have acted " dishonestly " without acting " unlawfully " in respect to the bank's affairs. This request was also so fully covered by defendant's twelfth request which was granted, that it might correctly have been refused in toto.

Assignment 17. There is nothing in this assignment by which the accounts whose admission is alleged is error, can be identified. They are mentioned as " said accounts," without further description. If we assume the reference to be made to the accounts of Herzfeld & Co. with " Frank Porterfield, separate," and that of Latham, Alexander & Co., with Porterfield and Spurr—and this is the theory of counsel for plaintiff in error—they were plainly competent under the same rule of evidence which sanctions the admissibility of the transactions had with Kohn, Pepper & Co., De Neufville & Co., and Latham, Alexander & Co., discussed in the examination of defendant's 12th assignment.

Assignment 18. Defendant's 14th request was rightly denied, because fully covered by the instruction given in response to defendant's 12th request.

Assignment 19. The questions arising under this assignment are presented as if it involved the right of a defendant in a criminal case to give in evidence, his character for truth and veracity. It complains of " the exclusion of the evidence of John Overton and other witnesses offered by defendant; first, as to defendant's good character for truth and veracity; and, secondly, as to defend-
122 ant's good character for honesty and integrity during the whole period of his residence in Nashville." * * * After defendant had testified, his counsel claimed that his testimony had been impeached by the cross-examination, and offered testimony to his good character for truth and veracity and honesty and integrity during the entire period of his residence in Nashville, down to the time of the trial. The court limited the inquiry into defendant's general character to the time of the failure of the bank, reserving for further consideration his right to adduce evidence of his character for truth and veracity. To this ruling the defendant duly excepted. The Government " admitted defendant's good character for honesty and integrity down to the period of the charge." Whereupon, the court limited defendant to ten witnesses upon that point, and that number was examined under the above limitation as to time. The correctness of that limitation is the first inquiry. The reasons assigned by the learned judge for restricting the evidence of defendant's reputation for honesty and integrity to the time of the bank's failure, meet our approval. He said: " If we were to bring the time down to the present, it would be liable to embarrass the jury and turn their minds from the real merits of the case, and

put before them opinions which ought to be kept as far from the jury as possible. * * * We would proceed to launch ourselves upon an inquiry as to what the people of the community thought of the case at present." * * * The authorities support this ruling.

State *v.* Marks, 51 Pac. Rep., 1090.
State *v.* Kinley, 43 Iowa, 296.
Wroe *v.* The State, 20 Ohio St., 401, 472.
White *v.* The State, 111 Ala., 92.

The question raised by the second branch of this assignment was rightly decided. The ground on which the offer of evidence as to defendant's character for truth and veracity was based and is here urged, was, " that defendant had been attacked as a witness and his testimony impeached by the substance and manner of his cross-examination by counsel for the plaintiff, which had shown a purpose to argue to the jury that he had not testified honestly and conscientiously, but had testified falsely." No testimony was introduced by the Government attacking defendant's character for truth and veracity, nor was any evidence offered in rebuttal by the Government. A careful reading of defendant's cross-examination fails to disclose any ground for the admission of evidence of his general reputation for truth and veracity. The fact that contradic-
123 tions exist between his testimony and that of other witnesses affords no ground for its admission.

1 Greenleaf on Evidence, sec. 469.

In his character as a witness, defendant is not entitled to any privilege not extended to other witnesses.

Reagan *v.* U. S., 157 U. S., 301, 305.
U. S. *v.* Hollis, 43 F. R., 248.

In general, where no attempt has been made to impeach him by evidence of bad character, or of contradictory statements, or by the cross-examination, he cannot corroborate his testimony or give it weight by evidence of his general reputation for truthfulness—nor will his own view of the effect of his cross-examination make such testimony competent. The rule as to the admissibility of evidence of character is thus broadly stated by Greenleaf (1 Gr. on Ev., sec. 54)—"And in all cases where evidence is admitted touching the general character of the party, it ought manifestly to bear reference to the nature of the charge against him." The evidence offered was manifestly intended to give weight to the defendant's personal testimony—not for the purpose of establishing a general character inconsistent with the offense charged. The weight of reasoning and authority justified its exclusion.

Stevenson *v.* Genning, 64 Vermont, 609.
Funderberg *v.* The State, 100 Ala., 36, 37; (14 South Rep., 877)
Tendens *v.* Schumers, 112 Ill., 266, 267.
People *v.* Cowgill, 93 Cal., 597.

A careful examination of the record satisfies us that the defendant has had a fair trial, and that both in the rulings upon evidence and in the submission of the case to the jury, his rights were carefully protected. The judgment of the circuit court for the middle district of Tennessee is therefore affirmed.

124 And afterwards, to wit, on July 1st, 1898, a petition for rehearing was filed in said cause, which reads and is as follows:

Petition for Rehearing.

United States Circuit Court of Appeals for the Sixth Circuit.

MARCUS A. SPURR, Plaintiff in Error,
vs.
UNITED STATES, Defendant in Error.

Petition to rehear.

To the honorable the judges of the United States circuit court of appeals, sitting at Cincinnati, in the State of Ohio:

Petitioner, Marcus A. Spurr, the above-named plaintiff in error, respectfully petitions the honorable court for a rehearing of this cause, and says:

I.

He is advised there is error in the opinion of the honorable court on pages 6, 7 and 8, in disposing of the first assignment of error; and the grounds thereof are fully stated in the brief of counsel hereto annexed.

II.

He is advised there is also error in the opinion of the honorable court on page 8, in approving the refusal by the circuit court of the seventh request for special instructions; and the grounds thereof are fully stated in the brief of counsel hereto annexed.

III.

He is advised there is also error in the opinion of the honorable court on page 8, in approving the refusal by the circuit court of the fourth request for special instructions; and the grounds thereof are fully stated in the brief of counsel hereto annexed.

IV.

He is advised there is also error in the opinion of the honorable court on pages 8 to 11, in approving the refusal by the cir-
125 cuit court of the sixth and ninth requests for special instructions, and the modification of the second request; and the grounds thereof are fully stated in the brief of counsel hereto annexed.

V.

He is advised there is also error in the opinion of the honorable court on page 11, in overruling the sixth assignment of error, upon the clause of the charge stating the three facts necessary to be proven; and the grounds thereof are fully stated in the brief of counsel hereto annexed.

VI.

He is advised there is also error in the opinion of the honorable court on pages 11 and 12, in overruling the seventh and ninth assignments of error, based upon the modification of the fifth and part of the seventh requests for special instructions; and the grounds thereof are fully stated — the brief of counsel hereto annexed.

VII.

He is advised there is also error in the opinion of the honorable court on page 13, in overruling the eleventh assignment of error, based upon the action of the circuit court upon the request of the jury for further instructions; and the grounds thereof are fully stated in the brief of counsel hereto annexed.

VIII.

He is advised there is also error in the opinion of the honorable court on pages 13 to 15, in overruling the twelfth assignment of error, upon the admission of the stock transactions of 1886 and 1887; and the grounds thereof are fully stated in the brief of counsel hereto annexed.

IX.

He is advised there is also error in the opinion of the honorable court on pages 15, 16 and 17, overruling the thirteenth, fourteenth, fifteenth and sixteenth assignments of error, based upon the charge as to effect upon petitioner of Porterfield's dealing in stocks, and the refusal of the thirteenth and fourteenth, and the modification of the tenth and eleventh, requests for special instructions; and the grounds thereof are fully stated in the brief of counsel hereto annexed.

126 X.

He is advised there is also error in the opinion of the honorable court on pages 17 to 19, overruling the nineteenth assignment of error, based upon the exclusion of evidence of petitioner's good character for truth and veracity; and the grounds thereof are fully stated in the brief of counsel hereto annexed.

Petitioner makes part hereof the annexed brief of counsel, and asks that it be so treated. He prays that the honorable court will rehear and reconsider this cause; and that the judgment of affirm-

ance herein entered may be vacated and recalled, and the said judgment of the circuit court reversed and a new trial awarded.

MARCUS A. SPURR, *Petitioner.*

PITTS & MEEKS,
BAILEY P. WAGGENER,
Attorneys for Petitioner.

STATE OF TENNESSEE,
County of Davidson, Middle District of Tennessee.

Marcus A. Spurr, being duly sworn, deposes and says: I am the above named petitioner. The foregoing petition is true to the best of my belief, and is not filed for delay, but that justice may be done.

MARCUS A. SPURR.

Sworn to and subscribed before me this June 30, 1898.

H. M. DOAK,
Clerk U. S. Circuit Court, Middle Dist. Tenn.

I hereby certify that I am of counsel for above-named petitioner, and that the foregoing petition is, in my opinion, well founded in point of law.

JOHN A. PITTS,
Of Counsel for Petitioner.

Brief of Counsel.

The paragraph numbers in the foregoing petition will be followed in this brief:

I.

The ruling of the court on pages 6, 7 and 8, of the opinion, disposing of the first assignment of error, is based upon the
127 rule in civil cases, which does not obtain as to crimes. The cases cited from, 115 U. S., 339, 347, and 142 U. S., 71, are both civil cases, involving civil liability only.

The case of Agnew *vs.* The United States, 165 U. S., 33, 49, also cited by the honorable court, does not support the conclusion of the court in this case. The trial court, in that case, in the opening part of the instruction complained of, had said to the jury: "The rule of law in regard to intent is that intent to defraud is to be inferred from willfully and knowingly doing that which is illegal, and which, in its necessary consequences and results, must injure another." The trial court then, in the instruction, specified the alleged fraudulent acts, which were the placing of worthless securities in the bank and taking credit for them, of course, as the court had previously said, knowing them to be worthless, and told the jury that they must necessarily infer from such acts, thus willfully and knowingly done, if they found they were done, that the intent was fraudulent. The Supreme Court, in commenting upon this instruction (p. 50), said: "This was an application of the presumption that a person intends the natural and probable consequences

of acts intentionally done, and that an unlawful act implies an unlawful intent." The learned court cites 1 Greenleaf on Ev., sec. 18; 3 Greenleaf on Ev., secs. 13 and 14; Jones on Ev., sec. 23, and Bish. Cr. Prac., secs. 1100, 1101. These authorities apply the presumption only to acts knowingly and intentionally done; and to emphasize the view upon which we insist, Mr. Greenleaf, in section 13, of volume 3, quoting from Lord Mansfield in Rex *vs.* Woodfall, says: "Therefore, where an act, in itself indifferent, becomes criminal if done with a particular intent, there the intent must be proved and found; but where the act is in itself unlawful, the proof of justification or excuse lies on the defendant; and in failure thereof the law implies a criminal intent."

The act of July 12, 1882, under which petitioner is indicted, makes it a misdemeanor to "willfully" violate the provisions of section 5208, Revised Statutes. The word "willfully" in this statute, as held in Potter *vs.* United States, 155 U. S., 446, "implies on the part of the officer knowledge and a purpose to do wrong." This is the language of the court, and the court adds, in the same connection: "Something more is required than an act of certification made in excess of the actual deposit, but in ignorance of that fact or without any purpose to evade or disobey the mandates of the law."

128 It seems apparent that the certification of a check made in excesss of the deposit, nothing more being shown, is an act "in itself indifferent," as Mr. Greenleaf says in the section above quoted from, and only becomes criminal when "willfully" done; that is to say, when done with knowledge and a purpose to do wrong." Without this knowledge and purpose, the act is not a crime. In such case, according to Mr. Greenleaf, and, we submit, all the other authorities as well, the knowledge and purpose, or intent, are as essential parts of the crime to be proven before a *prima facie* case is made out as the act itself.

If the act of July 12, 1882, had said it should be a misdemeanor to violate the provisions of sec. 5208, Revised Statutes, omitting the word "willfully," it might be said that proof of the mere doing of the forbidden act would make out the case *prima facie*, and imply the necessary criminal knowledge and intent. But the law is not thus written. The act is criminal only when "willfully" done. The thing to be proven before any criminal intent can be inferred is, not that there has been a false certification when the drawer's account was overdrawn, but that there has been a willfully false certification—a certification with knowledge of the overdraft or want of funds, and a purpose to do wrong, a bad intent. But in this case the circuit judge told the jury that an essential part of the crime to be proven, namely, his guilty knowledge of the circumstances of his act, without which the act was not criminal at all, might be inferred from his duty to know those circumstances.

The holding of the court, we submit, is violative of the principles declared by the supreme court in the Potter case, in the great case of the Directors of the City of Glasgow Bank, and in numerous other cases cited in the argument at the trial.

II.

The ruling complained of in this paragraph, as applied to the seventh request for special instructions, it is respectfully submitted, does the petitioner great injustice.

This instruction is found on pages 51 and 52 of the printed record. It put the whole case and theory of petitioner's defense hypothecally and fairly. His theory and defense were not otherwise nor elsewhere fairly put by the court in any part of the charge. It did not attempt to exclude from the consideration of the jury any part of the evidence on either side; but it put the facts which he had attempted to prove in his own behalf, and on which he had relied for acquittal—facts which the record shows were supported by evidence upon which the jury would have
129 been warranted in finding that they were true. And the court was asked to charge the jury that, if they did find that these facts were true, then defendant should be acquitted. Assuming that these facts were true, and were so found by the jury, ought not petitioner to have been acquitted, whatever the Government proof might have been? Under that instruction, all the proof in the case was to be considered, on both sides—none of it was to be excluded or ignored, and the issue was not made to turn upon part of the evidence. The testimony of all the Government's witnesses, and all the circumstances adduced to show knowledge, were to be considered on the question whether petitioner had actual knowledge of the state of the account, and whether he acted honestly and in good faith; for all these questions, under this instruction, must have been found in his favor before the instruction could avail the petitioner. It is true, he could not have been convicted, under this instruction, upon any presumption or inference of knowledge drawn from his duty to know. But this instruction, and the fifth, of a similar character, but briefer, being out of the way, there was nothing left but for the jury to act on that inference and disregard the question of actual proven knowledge.

It is respectfully submitted that none of the cases cited by the honorable court are at all applicable to this instruction.

In Railway *vs.* Ives, 144 U. S., 433, the instruction sought to have the court to say, in substance, that the deceased was guilty of contributory negligence, and could not recover if certain specified facts existed. The court held the instruction improper because, first, the question being contributory negligence, the jury were bound to consider all the facts and circumstances bearing upon that question; and, secondly, because the instruction, so far as it was correct, had already been given, in general terms, in the part of the charge relating to proper care and contributory negligence, and the refusal to give it again, in different language, was not error. Manifestly, the instruction in the present case was not of that kind.

In Railway *vs.* Look, 163 U. S., 280, several instructions had been refused by the trial court, most of them on the ground that they had been given in substance in the general charge. The last one was of precisely the same character as that in 144 U. S., above

noticed, and its refusal was held proper upon the same ground, namely, that it was upon the question of contributory negligence, and sought to make the issue turn upon a few of the many facts in
the case bearing upon the question, whereas the jury were
130 bound to consider all of them—the court citing and quoting
from the Ives case in 144 U. S. Manifestly this case is equally inapplicable to the present one.

In Agnew *vs.* United States, 165 U. S., 51, the instruction was held to have been properly refused because, so far as it was correct, it had been substantially already given. Certainly this was not such an instruction as the present.

In Catts *vs.* Phalen, 2 How., 382, the action was for fraud practiced upon the plaintiffs by a young man, their employé, in inducing them to pay a certain lottery ticket. One of the defenses was that the defendant was a minor. The lottery was drawn in December, 1840; but the money was paid in February, 1841. On this question of minority there were two requests for special instructions prayed by the defendant: First, that "if plaintiff paid the amount of said prize under the belief that said ticket had been fairly drawn, the plaintiff cannot recover;" and second, "that if the jury shall believe from the evidence that in December, 1840, when the lottery was drawn, the defendant was an infant, the plaintiffs are not entitled to recover in this action." The Supreme Court held the first properly refused because it ignored the fact, which was in evidence that the plaintiff's belief was caused by the false and fraudulent assertions of the defendant. The second was held properly refused because, first, it restricted the question of minority to December, 1840, when the lottery was drawn, and ignored the period of February, 1841, when the money was paid; and, secondly, because the defendant's minority was no defense to an action founded on his fraud and falsehood. The comments of the court upon these instructions are so clearly illustrative of what is a faulty instruction on account of its placing the issue upon only a part of the evidence, that we copy one paragraph, the other being similar:

"The first instruction, if granted, would have excluded from the consideration of the jury all reference to the fraud which produced such belief in the plaintiff, and they must have given it the same effect, whether it was founded in fact, or caused by the false asseveration of the fact by the defendant, knowing it was a falsehood, and thus depriving the jury of the right to decide on the whole evidence."

These are all the cases cited by the honorable court on this question. They do not, we respectfully urge, apply at all to the instruction in question. They show clearly, and this is especially true of
the second Howard case, that a partial instruction, such as
131 the honorable court erroneously conceives our seventh to be,
is an instruction which singles out certain facts, and makes the question involved turn upon them, independently of other material facts bearing upon the same question, which, if true, would or might produce a different result. Thus, as in the second Howard case, where the instruction would make the defendant's liability

turn upon the plaintiff's belief of a certain fact, ignoring the other proven and material fact, that that belief was induced by the defendant's fraud. And thus, again, as in the cases in 144 and 163 U. S., where the instruction would make the existence of contributory negligence turn upon certain specified facts, where there are other material facts and circumstances proven bearing on that question, which, if considered, might change the result.

A correct test of the applicability of this rule to our seventh instruction is this: Assuming that the jury should have reached the conclusions stated hypothetically in the instruction, what other fact or facts, not involved in it, was there any evidence tending to establish that could have affected the result?

We believe there was not a syllable of evidence offered by the Government but must necessarily have been considered by the jury in determining the questions submitted in that instruction. The evidence involved was no less than the whole evidence in the case; and, this being so, the instruction was not obnoxious to the rule declared in the cases cited. It has never been insisted that it was covered by the general charge or by any other instruction given; nor that, if the case put by it was found by the jury the petitioner was not entitled to acquittal. It ought, therefore, to have been given.

III.

It is respectfully submitted that the honorable court, in its opinion (p. 8), overlooks the fair and real meaning and purpose of the fourth request for special instructions, and places upon it an entirely erroneous construction. The substance of the instruction, briefly stated, was that, if the jury found that petitioner did not keep the books, did not have charge of the Dobbins & Dazey account, and it was not at any time referred to him or his attention called to it, and that he was assigned to other duties, then no inference of his knowledge of the state of that account should be drawn from the mere fact that the account appeared on the books as overdrawn, for knowledge of the contents of the books could not be imputed to him simply because he was president or director.

132 This was the plain meaning of the instruction, and it was a sound proposition, and ought to have been given. It stated a simple and well-established proposition of law (Briggs *vs.* Spaulding, 141 U. S., 162, 163, and authorities there cited), and did not pray "for an instruction on the weight of conflicting evidence." If this honorable court, by the statement in the opinion that the request called "for a direction to the jury to disregard presumptive proof, on the assumption that it was rebutted by other matters of fact," meant that the purpose was to have the jury disregard any supposed presumptive proof of petitioner's knowledge of the state of the account arising out of the undisputed fact that he was president and director, and the fact that the account on the books was overdrawn, then, it is respectfully urged, the honorable court was in error in holding that the instruction was properly refused. So

interpreted, the instruction should have been given under the law as declared in Briggs *vs.* Spaulding, *ut supra.*

And here, also, the authorities cited by the honorable court are not applicable to the instruction, it is respectfully urged. Three cases are cited. In Crane *vs.* Morris, 6 Pet., 616–'17, the question was upon the delivery of a deed. The court was asked to instruct the jury "that in the absence of all proof that the trustees or any person for them, ever had the deed, and there being no proof of a holding under it, the fact that the deed came out of the hands of Morris, in 1787, is sufficient, of itself, to rebut any presumption of a delivery arising from the proof of the deed by William Livingston, or the proof of the handwriting and death of the subscribing witnesses." The court, in holding this instruction properly refused, said:

"This instruction plainly called upon the court to decide mere matters of fact which were in controversy before the jury, and, upon the assumption of such matters of fact, to direct the jury that they rebutted other matters of fact. It was no part of the duty of the court to decide upon the relative weight and force of these facts. They exclusively belonged to the jury, and the instruction was properly refused."

Other instructions of similar kind were disposed of by the court on the same ground, on page 617.

Now, our fourth request did not ask the court to decide that certain specified facts would rebut a certain presumption arising out of other facts; it did not ask the court to decide upon the relative weight and force of any opposing facts or circumstances whatever. On the contrary, it only sought to have the court tell the jury, as a matter of law, generally, that knowledge of the contents of
133 the books of a bank is not imputable to a person simply because he is president or director, and, particularly, that in this case, if petitioner was not the book-keeper, did not have charge of the Dobbins & Dazey account, and it was never referred to him or brought to his attention, the jury ought not to infer his knowledge of its condition "from the mere fact that the account appeared on the books to be overdrawn."

Kelly *vs.* Jackson, 6 Pet., 622, also cited by this honorable court, was based upon the same title and evidence as the case of Crane *vs.* Morris, and was decided at the same time. Substantially the same instructions were involved in both cases, and were disposed of upon the same grounds and by the same learned judge.

The citation to Lilienthal's Tobacco *vs.* United States, 97 U. S., 237, 268, does not cover any ruling upon refusal of requests for special instructions; but the court, on page 268, citing 1 Whart. Ev., sec. 371, holds that a trial judge, in a civil case, where a presumption of fact exists against a party, may properly instruct the jury that the burden is on such party to remove the presumption, and that, if he does not, the case must go against him on such point—a proposition which has never been questioned in the present case. This, however, does not touch the question presented by petitioner's fourth request.

IV.

The grounds of complaint in the fourth paragraph of the petition are briefly, first, that the court, by the addition shown in the record to the second request, left the jury to infer that petitioner knew the state of the account upon which the checks certified were drawn from the fact of certification and his duty under the by-law, and this, too, without any qualification whatever; second, that the refusal of the sixth request, wherein the defendant's guilt was sought to be determined upon his actual knowledge of the want of funds and his "willful" certification with such knowledge (excluding imputed knowledge, from duty), emphasized the error in the addition to the second request; and, third, that the refusal of the ninth request still further emphasized this error; this request being that petitioner's want of knowledge of the state of the account would be a complete defence unless such want of knowledge proceeded from a will to disobey the law, or from an indifference to its commands, and, furthermore, that this error was not cured by the other portions of the charge quoted by this honorable court in its opinion, on this subject, in view of the instructions elsewhere given by the
134 honorable circuit judge on the subject of petitioner's duty to know, and the evidential consequences of such duty, and on the subject of the necessary elements of a criminal false certification, wherein the court not only failed to use the word "willfully" with reference to false certification, but failed to anywhere properly define a criminal false certification, but told the jury that a false certification "is the certifying by an officer of the bank that a check is good when there are no funds there to meet it."

It is respectfully insisted that the opinion of this honorable court does not give to this action of the trial court the proper weight that it actually bore upon the jury in the trial, to the prejudice of the petitioner.

V.

The sixth assignment of error was upon that part of the charge wherein the court instructed the jury, in substance, that in order to convict, the Government must prove (1) certification by defendant, (2) the want of funds, and (3) defendant's knowledge of the want of funds, adding: "This last element of the offense charged will be explained and its modification stated further on."

Our contention on the argument was that this instruction was erroneous, in that it omitted the element of the offense implied in the use of the word "willfully" in the statute, namely, with bad intent or purpose, and that this omission was not supplied in the promised subsequent instruction. In other words, that the offense consisted in the certification not only with knowledge of the want of funds, but also with bad intent or purpose—a false certification made "willfully;" and that this essential element of the offense was entirely omitted. And it was argued that the offense would not be made out by proving the three things specified in this instruction, but that the Government must go further and show a bad intent, a

bad purpose. This contention, as to the essentials of the offense, the honorable court, on page 11 of the opinion, concedes to be correct. The opinion says:

"This would be true if the instruction had been submitted as complete in itself upon the essentials of the crime, and as dispensing with the necessity of proof of the intent which accompanies the act of certification, but," the opinion adds, "the last paragraph clearly excluded that view of its design and scope."

We readily concede that, so far, the court has most ac-
135 curately stated the matter on this point. And what, now, is the attitude of the case, according to the opinion, on this instruction up to this point? Obviously, that the instruction gives a definition of the offense, which is defective and erroneous as it stands, unless there is added, in the promised further instruction, a definition or declaration of the intent with which the act was done, superadded to knowledge of the want of funds, and which must be proven, in addition to knowledge of the want of funds. This much, it seems, is very clear. It necessarily follows, that the next step is to inquire whether, in the promised further instructions as to the explanation and modification of "this last element of the offense charged," *i. e.*, knowledge of the want of funds, there is given, as an additional and essential element of the offense, the omitted intent, which must also be proved.

It is in answering this inquiry that we insist this honorable court has committed error, in completely dropping out and overlooking the thing inquired after.

The opinion, referring to this promise of the instruction to state "further on" the explanation and modification of this element of the offense, says: "Its promise was fulfilled in the passages in the charge quoted in our review of the sixth request."

Now let us see if this is true, bearing in mind constantly that what we are looking for is, in some proper and intelligible form, a statement of the intent with which the act must have been done to be criminal, superadded to knowledge of want of funds—the essential part of the offense which this honorable court has conceded was omitted in that part of the charge defining the offense in the first instance, and without which it is erroneous.

The opinion, on pages 8 and 9, in reviewing the sixth request, quotes from the charge as follows:

"You must be satisfied from the proof, beyond a reasonable doubt, of every fact essential to the guilt of the defendant, of the specific charges contained in the indictment before you will be warranted in convicting him."

* * * "The facts which are charged as constituting guilt must be so proven as to persuade a clear and abiding conviction of defendant's guilt, such conviction as is not shaken by any reasonable doubt grounded upon the testimony. If you are so convinced of his guilt, he should be convicted; otherwise, not."

It is needless to suggest that the statement of the intent, which we are looking for, is not to be found in these extracts.

The only other extract quoted in the opinion reviewing the sixth

request, and which is manifestly the explanation and modi-
136 fication referred to by the learned circuit judge, is as follows:

"Knowledge of the defendant of the state of Dobbins & Dazey's account when he certified the checks is thus made the pivotal question in the case. Upon this question of knowledge the court charges you that it is not necessary for the Government to show that the defendant knew of the lack of funds of Dobbins & Dazey from an actual examination of the books at that time, or from any inquiries made at that time. If the defendant knew that he had good reason for believing Dobbins & Dazey's account to be overdrawn and refrained from making such inquiry for the reason that he knew the condition of the account, or because he was purposed to certify the check without reference to whether there were funds sufficient to meet it or not, that is sufficient. That is to say, if he shut his eyes to what he believed was the fact, and kept himself in ignorance of the state of the account because he believed an examination would disclose the facts, this would be equivalent to express knowledge. Nor is it necessary to prove that the defendant knew just what was the extent of the overdraft on Dobbins & Dazey's account or the lack of funds to meet the checks. If he knew of the substance of the fact that Dobbins & Dazey had no funds there to meet their check, and that there was no warrant for marking the check 'Good,' that was sufficient."

Now, in all fairness and candor, where is there, in any of these quotations from the charge, any statement which cures the conceded defect in the instruction challenged by the sixth assignment of error? Where is there any statement or definition of what this court concedes, in the face of its opinion, was an essential element of the offense which must be proved, the criminal intent?

In truth, as we argued and demonstrated in the original briefs, there is no such statement in any part of the charge, from beginning to end. The court did not admit that idea into the case at all, either in its rulings upon evidence, or upon special instructions, or in any part of the general charge. That error pervades the whole case. The honorable circuit judge, in stating that "this last element of the offense charged will be explained and its modifications stated further on," had no idea or intention in his mind of adding anything to the burden of the Government with reference to the elements of the offense, but quite the contrary, as his whole conduct of the case, and especially his further explanation of the element of knowledge conclusively demonstrated.

137 Immediately following the definition of the offense, which this honorable court now concedes was erroneous, standing by itself, the learned judge proceeds to give the promised explanation and modification of the third element of the offense. Looking to the full charge, which appears in the back of the brief upon the motion for new trial, and which was, by consent, made part of the record upon the argument at Cincinnati, it will be seen that the court first stated, after laying down these three things necessary to be proven:

"Taking up this evidence in detail, it is not denied that the defendant certified these checks, and, secondly, that the account of the drawers was overdrawn when these certifications took place; but, third, the defendant asserts that he was not cognizant of the fact that the account of the drawers was overdrawn at the time of his certification of the checks."

The learned circuit judge then proceeds with his promised explanation and modification, which is quoted above.

Now, it is to be noted, first, that the thing promised "further on" is not an additional fact or element of the offense which the Government must prove, but an explanation and modification of the proof required as to knowledge. Having stated that the certification and want of funds were not denied, but that defendant's knowledge of such want of funds was denied, he begins the promised modification by saying: "The knowledge of the defendant of the state of Dobbins & Dazey's account when he thus certified the checks is thus made the pivotal question in the case." Why pivotal question, if not the only disputed question? It was considered and treated by the judge as the only disputed fact deemed material by him, and as the fact upon proof of which the Government's right to convict depended, as he had stated, the other two essential facts being admitted, or not denied.

His explanation and modification then is, in substance, to relieve the Government of the necessity of proving even this third element of the offense (knowledge) by direct evidence; and to tell the jury that, "if the defendant knew that he had good reason for believing Dobbins & Dazey's account to be overdrawn, and refrained from making such inquiry," etc., etc., "that is sufficient. That is to say, if he shut his eyes to what he believed was the fact, and kept himself in ignorance," etc., etc., "this would be equivalent to express knowledge. Nor is it necessary to prove that defendant knew just what was the extent of the overdraft," etc., etc. "If he knew of the substance of the fact that Dobbins & Dazey had no funds there," etc., etc., "that was sufficient."

138 Sufficient for what was all this? Undoubtedly, to establish knowledge of the want of funds—the third element of the offense, as originally stated.

Instead of adding to the burden of Government the necessity of proving a criminal intent, superadded to knowledge of the want of funds, the promised modification relieves the Government of the necessity of proving, directly, even that knowledge, and explains to the jury how that fact may be shown indirectly, constructively, and by inference or presumption.

Upon this honorable court's own statement of the law bearing on this question, the case ought to be reversed on this point.

VI.

This paragraph relates to the modification of the fifth and of the latter part of the seventh instruction (which, as a whole, was refused, and has been discussed under paragraph II).

The honorable court, we respectfully submit, has committed two

errors in disposing of these requests. First, in assuming that the indictments in this case are predicated upon that part of the act of July 12, 1882, quoted in the opinion, p. 12, prohibiting certification of checks "before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association." An inspection of the indictments, which are set out in the original transcript of the record on file in the clerk's office, but not in the printed record (see stipulation, page 1 of printed record) will show that they were based upon the first part of section 13 of said act, providing, "That any officer, etc., who shall willfully violate the provisions" of section 5208 of the Revised Statutes, etc., shall be guilty, etc.; and section 5208 makes it unlawful for such person to certify a check unless the drawer "has on deposit with the association" an amount of money equal to the amount of the check, but makes no reference to the amount being "regularly entered to the credit of the dealer on the books of the banking association."

Said section 13 of the act of July 12, 1882, in a subsequent portion creates another class of offenses by the words "or who shall resort to any device, or receive any fictitious obligation, direct or collateral, in order to avoid the provisions thereof" (*i. e.*, of section 5208), "or who shall certify checks before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty," etc. See p. 1, printed opinion in this case.

139 The latter class of offenses are not required to be committed "willfully," and this difference in the two classes of offenses is discussed by the Supreme Court in Potter *vs.* United States, 155 U. S., 446. It was conceded in all the trials of this case that the provision of the latter part of said section 13, quoted in the opinion at page 12, had no application under the indictments of petitioner.

It was, therefore, manifest error in this honorable court to apply that provision in the disposition of this case in any aspect.

Secondly, this honorable court seems to have overlooked the fact that the modification made by the circuit judge of the fifth request was more than a modification; it was a complete metamorphosis and reversal of its meaning; and not only this, but rendered it contradictory and confusing in the extreme. And whether it ought to have been given in its original form or not, it was error to give it as modified and changed.

The evidence showed, without contradiction, that on the day upon which the check was certified by the petitioner upon which he is sentenced, namely, the 3d of January, 1893, there was deposited by Dobbins & Dazey nearly twice the amount of the check certified. (Rec., p. 28.) There was also evidence tending to show that although their account was overdrawn during the period covered by the checks certified by petitioner, he did not know it, and that in certifying the checks he acted upon information received from either the cashier or exchange clerk that more than enough exchange had

been deposited by Dobbins & Dazy on each day of certification to cover the check certified.

Now, in view of this aspect of the case, the fifth request was for an instruction, in substance, that if the defendant was ignorant of the overdraft, and certified the checks in the belief, at the time, that the exchange deposited by the drawers on each day of certification was sufficient to cover the check certified on that day, he was not guilty, and should be acquitted [unless such ignorance of the overdraft was willful, as elsewhere explained in the court's instructions]—the words in brackets being added by the court, but without objection.

Having added the above words in brackets, the court further inserted the words: "Besides the overdraft then existing," so as to make the instruction read substantially:

If the defendant was ignorant of the overdraft then existing, and certified the checks believing that the exchange deposited was sufficient to cover the amount of the check certified besides the overdraft then existing, then he is not guilty, unless his ignorance of the overdraft was willful, as elsewhere explained in the charge.

Now, how can this be a proper instruction, whether in its original form it should have been given or not?

As given, it was not the instruction requested, nor anything like it; and it must be considered as if it had wholly originated with the court. It instructs the jury that, to be entitled to acquittal, the defendant must have believed the deposit sufficient to cover, not only each check certified by him, but also the overdraft then existing of which he had no knowledge, actual or constructive, according to the same instruction.

In effect, the instruction is, that defendant, in order to be innocent, must have seen that provision was made for the overdraft although he was utterly ignorant of such overdraft, both actually and constructively. It was equivalent to saying that defendant was only entitled to acquittal in the event the deposit covered both the check certified and the overdraft then existing on the books, whether he knew of the overdraft or not. It held him to knowledge of the overdraft although the jury should find that he had no such knowledge, actually, and although such knowledge could not be imputed to him from his "shutting his eyes to the facts," etc., as elsewhere explained by the court.

In short, the circuit judge by this instruction himself makes, absolutely, the inference of defendant's knowledge of the state of the account, which he elsewhere instructed the jury that they might make from his duty to know it, and this, too, even though the jury should find that he had no such knowledge, and was otherwise not chargeable with such knowledge.

The same most glaring error was committed by the trial judge in cutting off from its context the latter part of the seventh instruction, changing it in the same way, and giving it, as thus cut off and changed, as a separate and independent instruction—thus converting an instruction asked, which would have given the jury an op-

portunity to acquit, into an instruction under which it was not possible to acquit, for it was not possible for the defendant to contemplate a thing of which he had no knowledge.

This honorable court, in its treatment of these two instructions, on pages 11 and 12 of the opinion, wholly overlooks the fact that the fifth instruction, as given, actually assumes upon its face a finding of the jury of defendant's want of knowledge of the overdraft, both actually and constructively, and yet, notwithstanding this, holds him bound to see that such overdraft is provided for.

141 It is respectfully submitted that such an error ought not to be permitted to stand, when attention is called to it, and that this honorable court ought now to correct it by a reversal.

VII.

The error complained of here is in reference to the action of the circuit judge upon the request of the jury for further instructions as to false certification of checks, and this honorable court's disposition of that question.

It has been shown, we think clearly, that the court had not previously given the jury any full and clear definition of the offense charged. It had not stated that any criminal or bad purpose or intent was necessary. It had not even used the word "willfully," as applied to the act of certification, and the only special instruction requested employing that word in such connection (the sixth) had been refused. The word "willfully," as used in the statute of 1882, and the intent implied by it, had been discussed in argument, as the record shows, Government counsel having admitted, in his opening statement, the necessity of proving such intent, and day after day having been consumed with evidence of circumstances collateral to the main issue, adduced to show such intent. The court had not even read to the jury the act of 1882, creating the offense.

Now, under these circumstances, the jury, after deliberating some hours, return into court and say: "We want the law as to the certification of checks when no money appeared to the credit of the drawer."

The court read to them, twice, section 5208, Revised Statutes, and, then, after a lecture upon the evil of certifying checks without funds to meet them, omitting any reference to the knowledge of the certifying officer, or his intent in making the certification, he tells the jury, in so many words, "That is what is meant by false certification. It is the certifying by an officer of a bank that a check is good when there are no funds there to meet it." The court concluded by saying, "You understand what I have said now is to be taken in connection with what I have before instructed you" (Rec., p. 53).

Now, turning to the general charge, beginning on page 86 of the brief on motion for new trial (see page 87 for words quoted), it will be seen that, after setting out the four checks described in the indictment, the trial judge said: "It is upon the false certification of the four above-mentioned checks that the issues of this case are joined."

142 It is thus seen by reference to what the circuit judge had previously instructed the jury, that what he had in mind in defining a false certification to the jury on their return into

court, and what the jury must necessarily have understood him to refer to, was a criminal, false certification—the kind of false certification upon which "the issues in this case are joined."

Seeing what the judge had reference to, and what the jury necessarily must have understood him to have reference to, counsel for petitioner arose when these last instructions had been given and the jury were retiring from their seats, and stated to the court that he thought what the jury wanted was the act of 1882, making it misdemeanor to willfully violate the section of the Revised Statutes which had been read to them, and that the court ought to read and expound that act to them. This the court refused to do, remarking that the jury had nothing to do with that act (Printed Rec., pp. 53-'4).

Now, as we understand the opinion of this honorable court, the action of the trial judge at this point is approved on the ground that our contention "that the court gave the jury to understand that the certification of a check when there were no funds in bank to meet it was sufficient to sustain the indictment," is an assumption which is negatived by the answer of the jury" (p. 13 of opinion).

That our contention was not an assumption, but was based upon fact, we submit, has been demonstrated. As to the "answer of the jury," that their question had been answered, negativing our contention, it ought to be sufficient to remind the court that the jury were not the arbiters of the law, nor the censors of the judge as to matters of law. They had asked the judge for instruction in a pure matter of law, and it was the judge's duty to instruct them correctly. Whether he satisfied the jury or not is wholly immaterial; the question is, did his instruction satisfy the law?

VIII.

This paragraph relates to the admission in evidence of the stock transactions of 1886 and 1887. We do not think the court has given due weight to the numerous authorities cited on this point in our record brief, nor that those cited by the honorable court in its opinion support its conclusions; but this brief is already too long to admit of our going into these questions further. We ask, however, that the court, in reviewing the case on other points which we have elaborated, also review and reconsider the facts and the authorities cited on this point, both in the opinion and in our record brief.

143

IX.

This paragraph relates to the disposition of several instructions, some given and some refused, upon the effect of Porterfield's dealings in stocks and bonds, in the name of the bank and individually, upon petitioner's right to rely upon his statements with reference to the condition of the Dobbins & Dazey account at the date of petitioner's certification.

Without elaboration of these several instructions, we submit, generally, that the honorable court, in its opinion, has not apparently apprehended our contention in reference to them; which was, in

brief, that the action of the court denies to defendant the right to rely upon the statements of the cashier in respect to matters of the bank under his charge, if he knew that the cashier was conducting stock purchases and sales on margin for the customers of the bank, as all other cashiers and banks in the city were doing, and for the benefit of the bank in the commissions received, because such transactions were not within the corporate powers of the bank, although defendant had no knowledge or suspicion, and was chargeable with none, that Porterfield was converting or misapplying the bank's funds or acting dishonestly in any way—in other words, that defendant's knowledge of a technical violation of the national banking law by the cashier, involving no moral turpitude or dishonesty or inveracity whatever, would deprive him of the right to rely on anything the cashier might say with respect to other and independent matters under his charge as cashier; whereas, our contention was that the acts of the cashier, known to defendant must have involved some moral turpitude, some infidelity to the interests of the bank, or some untruthfulness, before they could have that effect.

This view, we respectfully submit, is sustained by all the authorities, without a single exception; and it is not met in the opinion of this honorable court.

The position of the circuit judge on this question, as shown by the action cited in this paragraph of the petition, is the same as if he had charged the jury that, if the cashier, with defendant's knowledge, had charged a borrower from the bank 12 per cent. for a loan in Tennessee, where only 6 per cent. is lawful, and thereby violated the national banking law, the defendant could not thereafter rely upon anything such cashier might say with reference to the bank's affairs under his charge.

We submit, most respectfully, that this is not law.

144 X.

This paragraph relates to the disposition of the question raised by the nineteenth assignment of error, upon the exclusion of testimony as to defendant's good character for truth and veracity.

We confess we do not understand clearly the opinion of the honorable court on this question.

Whether the court means to hold that evidence of good character for truth is not admissible until after evidence of bad character has been offered, as the circuit judge held, is not stated. If so, then we submit that such holding is against reason and the overwhelming weight of authority.

The opinion does not state that the court finds no assault was made in the cross-examination of defendant upon the honesty and integrity and sincerity of his testimony.

It does not state that the cross-examination did not manifest a purpose to argue to the jury that defendant had not testified honestly and conscientiously, but had testified falsely. It makes no reference to the fact, plainly stated in the record (p. 98), that counsel for the Government did, in fact, in his argument, insist "that the

defendant had not testified truthfully, and that his testimony was unreasonable and not worthy of belief."

It makes no reference to the further fact, also plainly stated in the record (pp. 98–'9), that the honorable circuit judge himself assaulted the integrity of defendant's testimony, in the charge.

And so, we do not know really what the views of this honorable court are on these questions. But it is clear the opinion does not notice at all the points upon which reliance was placed in argument for a reversal of the action of the trial court; and we respectfully ask this honorable court to review and reconsider this nineteenth assignment of error.

PITTS & MEEKS,
BAILY P. WAGGENER,
Counsel for Petitioner.

145 And afterwards, to wit, on July 4th, 1898, an application to stay mandate was filed in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

MARCUS A. SPURR, Plaintiff in Error,
v.
THE UNITED STATES, Defendant in Error. } No. 502.

STATE OF TENNESSEE,
County of Davidson, Middle District of Tennessee, } *ss:*

Marcus A. Spurr, the above-named plaintiff in error, states that he desires and purposes, in the event his petition for rehearing now pending before the United States circuit court of appeals, in this cause is denied, to make application to the Supreme Court of the United States at the earliest possible day for a writ of certiorari, and a review of the case in that court. He is advised and believes that such application can only be made to the Supreme Court when in session; and that it has finally adjourned for the present term, and will not again be in session until in October next. He is advised and verily believes that he has good ground for his contemplated application for certiorari, in case his petition for rehearing shall be denied, and he purposes, in the event stated, to make such application in good faith and not for delay; and he respectfully asks this honorable court, in view of the circumstances, and in the event his petition for rehearing is denied, to stay the issuance of the mandate herein until his said application for certiorari can be made to and disposed of by the Supreme Court.

MARCUS A. SPURR.

Sworn to and subscribed before me July 2nd, 1898.

H. M. DOAK.

I am of counsel for the above-named affiant and, in my opinion, the above application for stay of mandate and the contemplated

application to the Supreme Court for the writ of certiorari are well founded in point of law.

JOHN A. PITTS,
Of Counsel for Affiant.

[SEAL.]

146 And afterwards, to wit, on October 8th, 1898, an order was entered in said cause; which order reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

MARCUS A. SPURR
v.
THE UNITED STATES.

On consideration by the court, the petition for rehearing and application for stay of mandate filed herein, are both denied.

And on motion of plaintiff in error to have the entire charge and instructions of the circuit judge upon the trial of this cause formally incorporated into and made part of the record, and it being within the knowledge of this court that upon the argument before it on the 17th day of November, 1897, it was agreed by counsel for both parties then and there present that the entire charge and instructions of the circuit judge upon the trial were correctly printed on pages 86 to 100 inclusive, of the printed brief of counsel for plaintiff in error on the motion for new trial and that the same should be then and there made part of the record and submitted to this court as such, which by the assent and approval of the court was accordingly done and said entire charge was then and thereafter considered by the court as part of the record in determining the cause, the said motion is allowed; and the said copy of the charge being now here in court, the clerk will file the same as part of the record in this cause.

And afterwards, on the same day, to wit, on October 8th, 1898, the said copy of the charge was filed as part of the record in this cause and is in the words and figures as follows:

Copy of Charge of the Circuit Judge.

Filed Oct. 8, 1898. Frank O. Loveland, clerk.

Entire charge of court as given, showing in quotations the portions of defendant's special instructions which were granted.

147 GENTLEMEN OF THE JURY: Your patience and fidelity in the attention which you have given to this case thus far afford ample grounds for confidence that you will pursue your duty to the end with the same sincere fidelity of purpose.

The conduct of their business by national banks is carefully hedged about by many provisions of law intended for the security of the public doing business with them and of their stockholders. The necessity for that security requires that those provisions should

be faithfully enforced. The courts of the United States are the proper tribunals for that purpose. We are called upon in the present case to discharge that duty upon indictments charging grave violations of this law. Great care must be taken that punishment shall not fall upon an innocent person, but it is equally our duty, if the charges are proven beyond a reasonable doubt, to proceed to the conclusion which legal justice requires. The usage and practice of these courts is founded upon the legal proposition that it is the province of the court to decide all questions of law, and that it is the province of the jury to decide the questions of fact. Whatever may be the usage and practice in the State courts of Tennessee, the law of the United States, by which the court and jury are bound in the disposition of this case, is to the effect which I have just stated. The sum of the matter is, then, that the jury are bound by the instructions of the court as to matters of law. The suggestions of the court as to evidence, touching matters of fact, are for the assistance of the jury, but it is the right and duty of the jury to finally determine all questions of fact without being trammeled by the suggestions of the court. It is usual in these courts for the judge to make such comments upon the evidence as the court may think expedient for the purpose of aiding the jury in reaching a disposition of the case upon its substantial issues, but this is the limit of the duty of the court upon such matters, and the jury will receive and act upon such suggestions so far as they may find them useful to them in their inquiry after the truth.

The specific charges upon which the defendant is now being tried are the certification of the following checks:

Check of Dobbins & Dazy on the Commercial national bank to Fourth national bank, dated December 9, 1892, for $15,000.

Check of Dobbins & Dazy on Commercial national bank to Fourth national bank, dated December 17, 1892, for $31,000.

Check of Dobbins & Dazy on Commercial national bank to Fourth national bank, dated January 3, 1893, for $40,000.

148 Check of Dobbins & Dazy on Commercial national bank to Fourth national bank, dated February 13, 1893, for $9,641.95.

Each of the offences just charged constitutes a specific violation of the law. It is competent for the jury to find the defendant guilty of all, or not guilty of any, or guilty of some and not guilty of others, or to find the defendant guilty or not guilty of some of them, being unable to agree as to others. It is upon the false certification of the four above-mentioned checks that the issues of this case are joined. The evidence of the former application of the funds of the Commercial national bank by Mr. Porterfield in his own speculations and those of himself and Spurr, with the knowledge of Spurr, has been admitted for a subsidiary purpose which will be presently explained. Reference is here made to the evidence of the transactions with De Neufville & Co., Herzfield & Co., Kohn, Popper & Co., and Latham, Alexander & Co., in New York.

In all trials upon accusation of crime the defendant is presumed to be innocent until that presumption is overborne by testimony

proving him to be guilty. The defendant is entitled to such a presumption in this case. The fact that there have been former trials of this case does not affect your duty; you are responsible for your verdict, and you are not here to register the opinion of others nor to follow in their wake. Your conduct should be wholly unaffected by the result of such former trials.

The Government is bound in order to maintain any of the counts in these indictments to prove:

First, that the defendant certified the check.

Second, that the drawers of the check had not sufficient funds in the bank to meet such check.

Third, that the defendant knew that there were no funds of the drawer in the bank sufficient to meet them. This last element of the offence charged will be explained and its modification stated further on.

Taking this evidence up in detail, it is not denied that the defendant certified these checks, and secondly that the account of the drawers was overdrawn when these certifications took place, but third, the defendant asserts that he was not cognizant of the fact that the account of the drawers was overdrawn at the time of his certification of the checks.

The knowledge of the defendant of the state of Dobbins & Dazy's account when he certified the checks is thus made the pivotal question in the case. Upon this question of knowledge the court
149 charges you that it is not necessary for the Government to show that the defendant knew of the lack of funds of Dobbins & Dazy from an actual examination of the books at that time or from any inquiries made at that time. If the defendant knew that he had good reason for believing Dobbins & Dazy's account to be overdrawn and refrained from making such inquiry for the reason that he knew the condition of the account or because he was purposed to certify the check without reference to whether there were funds sufficient to meet it or not, that is sufficient. That is to say, if he shut his eyes to what he believed was the fact, and kept himself in ignorance of the state of the account because he believed an examination would disclose the facts, this would be equivalent to express knowledge. Nor is it necessary to prove that the defendant knew just what was the extent of the overdraft on Dobbins & Dazy's account or of the lack of funds to meet the checks. If he knew of the substance of the fact that Dobbins & Dazy had no funds there to meet their check and that there was no warrant for marking the check "Good," that was sufficient.

I am requested by counsel for the Government to instruct you, and you are charged, that if you are satisfied by the proof beyond a reasonable doubt that the account of Dobbins & Dazy with the Commercial national bank was not a special but a general depositor's account, the deposits as they came into the bank were *prima facie* applicable to the liquidation of overdrafts which appeared on the account at the commencement of business, and were thus absorbed, and if the amount of deposits made during the day were not equal to the overdrafts with which the day commenced, you

will consider that, as a matter of fact, there were no moneys on deposit on such day.

These checks before their certification were not obligations of the Commercial national bank; they were made such by the act of the defendant in certifying them to be good; by that act his bank was estopped to deny its obligation to the other banks which held them. It was the defendant's duty before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn. From the existence of such a duty you may draw an inference of fact that he did so inform himself, if he did not already know it. But the presumption of knowledge is not an absolute one and the defendant may show, if he can, that he did not, in fact, acquire information of the truth. And in general, if the defendant acted in good faith in making these certifications believing that the state of the account of Dobbins & Dazy
150 justified it, he is not guilty of the offense charged. Mere negligence or carelessness unaccompanied by bad faith would not render him guilty.

Evidence has been offered to prove Dobbins & Dazy to have been heavily overdrawn for some time when some of these checks were certified by the defendant and that this fact was and for some time had been a matter of common knowledge among the employés of the bank; and further, that it was not customary for checks to be sent to the president for certification when there were funds in the bank belonging to the drawer sufficient to cover the check, and there is other evidence, which, if believed, tends to show express knowledge on the part of the defendant of the state of the account; nevertheless, he testifies that he did not know that Dobbins & Dazy's account was overdrawn when he certified these checks, or any of them, or that there was a lack of funds in the bank to pay them and that he had no reason for supposing their amount to be overdrawn or that there was too small a sum to their credit to meet them.

Gentlemen, do you think this is true? It is for you to say, and as you are responsible for your answer, I shall do no more than challenge your serious attention to the evidence in the case touching this question. Not only that I have referred to, but all else that reflects light upon it. If you believe this statement of the defendant to be true, there is an end of the case and the defendant should be acquitted; and the same result should follow if you are not satisfied beyond a reasonable doubt that the contrary is a fact.

In determining these questions you are to look to all the evidence bearing upon his knowledge and give all, its just effect. You are not restricted to the direct evidence of the facts, the moral probabilities flowing from conceded facts, or which are proven to your satisfaction should also be considered and such probabilities may furnish ground for believing that that which they indicate is the truth.

Counsel for the defendant have submitted a series of requests for instructions, some of which I allow, others I give with modifications, which will be stated as I proceed, and others are declined,

either because in the opinion of the court they do not correctly state the rule of law or are liable to mislead. Such of them as are granted, I will now proceed to read and they will be regarded as part of the instructions of the court. They are to be taken, however, in connection with the propositions stated in these instructions by the court upon its own motion, and not as being in conflict with them.

151 I charge as requested: (1) "The statutes of the United States, under which the Commercial National Bank of Nashville was organized and conducted, do not prescribe or define the duties of the president and the cashier in respect to the books, accounts and details of the business of the bank; but they confer upon and vest in the board of directors the power to prescribe and define such duties and to adopt by-laws for that purpose."

Again: (2) "Certain by-laws of this bank have been put in evidence before you, relating to the duties and responsibilities of the cashier and president, and these by-laws, being numbers 8 and 9, having been read and commented on in the argument, I instruct you that the former relating to the duties and responsibilities of the cashier, means that he, the cashier, shall be responsible generally for all the moneys, funds and valuables of the bank, and requires him to faithfully apply and account for all its moneys, funds and valuables, and that he is primarily charged with the faithful keeping and accounting for the same. The latter, relating to the duties and responsibilities of the president, means that he is to be held responsible only for such sums of money and property of the bank as may be entrusted to his care, or placed in his hands by the board of directors, or by the cashier, or which may otherwise come into his hands as president, and that he is to be responsible only for such sums of money and property as may be thus placed or come into his hands, and is to faithfully and honestly apply and account for the same and otherwise faithfully discharge his duties as president. These two by-laws, taken together, mean and imply that the cashier is primarily responsible for all the funds, property and valuables of the bank, and that the president is responsible only for such funds, property and valuables of the bank as may be placed in his hands or as may come into his hands as president, and that both these officers are each to faithfully and honestly discharge their respective duties." To this I add: But I further charge you that the president is a general officer of the bank, and it is admitted that he had authority, notwithstanding these by-laws, to certify checks, and when the president assumed to certify these checks as good, the faithful and honest discharge of his duties required him to be informed of the condition of the account on which they were drawn.

(3) "If you believe from the proof that at the organization of the bank, the cashier was a man of experience in the details of the banking business, and that the president was without experience or special knowledge of such matters; and if you further find

152 that, in view of these facts, it was then understood and agreed by the board of directors that the cashier was to have immediate charge and supervision of the details, books, accounts and

internal affairs of the bank, and that the president was to give his attention to working up custom and patronage and looking after such special matters as should be referred to him for his attention, it will be proper for you to keep in mind these facts, together with the by-laws relating to those officers, in connection with the other proof in the case, bearing on the question whether the defendant had knowledge of the state of the account of Dobbins & Dazy at the time when he certified the checks of that firm which are mentioned in the indictment, and give to them such weight as you think they are justly entitled to on the question whether or not the defendant did actually know of the state of that account at the time he certified said checks."

To which I add: But these are part only of the facts which you should consider upon the question of the defendant's knowledge; and further, this instruction is to be taken with the other instruction that actual knowledge is not necessary if the defendant purposely abstained from inquiry.

Then this request: (5.) "If you find from the proof that the account of Dobbins & Dazy, upon the books of the bank, was overdrawn continuously during the period covered by the dates of the checks certified by the defendant and that the defendant was in fact ignorant of such overdraft; and that he certified the several checks mentioned in the indictment believing at the time that the exchange deposited by Dobbins & Dazy on the days upon which said checks were certified, was sufficient or more than sufficient to cover the amount of said checks," besides the overdraft already existing, "then he is not guilty and you should acquit him"—unless such ignorance of the overdraft was willful as elsewhere explained in the court's instructions. In this connection, you will bear in mind what I have previously charged you, that if this was a general and not a special account of Dobbins & Dazy, that the exchange which came in was applicable in the first place to the liquidation of the previously existing overdraft before there could be said to be any funds to the account of Dobbins & Dazy to respond to the checks.

(7.) If you find, "that in each instance where he certified a check the defendant had information from the cashier or exchange clerk, upon which he relied in good faith, that a sufficient amount had been deposited that day and was in the bank, to cover the check certified,"—I add: in addition to the existing overdraft—"he would not be guilty under the indictment and you should acquit him."

153 (8.) "If the proof fails to satisfy your minds clearly and beyond a reasonable doubt, that the defendant did actually know, at the time he certified the checks mentioned in the indictment that Dobbins & Dazy did not have on deposit in the bank sufficient funds and credits to meet the checks so certified, then you should acquit him, unless you are convinced by the proof beyond a reasonable doubt that he willfully, designedly and in bad faith"—these words mean substantially the same thing—"shut his eyes to the fact and purposely refrained from inquiry or investigation for the purpose of avoiding knowledge."

(10.) "If you find from the proof that the defendant relied upon the statements and representations of the cashier as to the condition of the account of Dobbins & Dazy, and that he did so in good faith believing those statements and representations to be true," and such statements were made at or so near the time of the certifications as to be fairly regarded as indicating the present state of the account, "his certifications, made in honest reliance upon them, would not be criminal; and if the cashier was reputed to be and believed by the defendant to be, a man of honesty and" right conduct as respects the affairs of the bank, "the defendant would have the right to rely upon his statements in regard to that account."

(11.) "The fact that the cashier had bought and sold stocks and bonds or cotton futures, and that the defendant knew that fact, would not establish or imply that he was personally dishonest nor deprive the defendant of the right to rely upon his statements in respect to the affairs of the bank, unless he also knew or had reason to believe that the cashier "had been using the funds or credits of the bank" instead of his own in such transactions. In order to deprive the defendant of the right to rely upon the cashier, it must be shown beyond a reasonable doubt that he knew that the cashier was unfaithful to the bank, and was acting" unlawfully in respect to its affairs.

(12.) "The defendant in this case is not indicted, nor being tried for buying or selling stocks or bonds or cotton futures, nor is it any crime against the laws of the United States for a bank officer to deal in such matters"—I interpolate, on his individual account, without involving the bank. "You should not allow the proof on this subject to influence your verdict in any way, unless you find from the proof beyond a reasonable doubt, either that the defendant used the bank's funds dishonestly in such transactions, or that he knew that the cashier was using the funds of the bank for his own personal interest, or the interest of others. If you find
154 beyond a reasonable doubt, that the defendant did know of the unlawful use of the bank's funds by the cashier, as before indicated, that fact would not of itself establish the defendant's guilt in this case, but would only be a circumstance to be considered by you in connection with the other evidence on the question whether the defendant knew, or was charged with knowing because he purposely abstained from knowledge, at the time of certifying the checks mentioned in the indictment, that Dobbins & Dazy did not have funds and credits on deposit in the bank sufficient to meet those checks."

(15.) "The law presumes the defendant to be innocent, and this presumption stands as an all-sufficient witness in his favor until the Government establishes his guilt by competent proof to your satisfaction beyond a reasonable doubt."

(16.) "The burden of proof rests upon the Government as to all the material facts and circumstances of the case, and if you have a reasonable doubt as to any fact or circumstance relied on by the Government," I should say, any material fact or circumstance relied on by the Government, "either as direct or inferential proof against

him, you should resolve that doubt in his favor, and dismiss such fact or circumstance from further consideration. You must be satisfied from the proof beyond a reasonable doubt, of every fact essential to the guilt of the defendant of the specific charges in this indictment before you will be warranted in convicting him."

I return now to the instructions given upon the court's own motion. The defendant, by a modern statute, is rendered competent to testify in his own behalf. His testimony is subject to be estimated with reference to the interest which he has in the result, and the jury will give it such credit as they think it is justly entitled to in view of its quality, the witness' burden of interest and the bearing of the other evidence in the case upon it.

The using, by its officers, of the funds and credits of a national bank in speculation on stock and cotton exchanges carried on either in the interest of the bank or its officers as individuals, or any other persons is unlawful; their franchises do not contemplate such operations and it is an abuse of the lawful powers of the bank, and such use is a misappropriation of the property of the bank. The fact, if it be such, that other national banks, however numerous they were, were engaged in such business did not render it legal, nor can the opinion of other persons that it was proper, rightfully affect the view which the court and jury must take of the legality of such
155 practices. If the jury find from the evidence that Mr. Porterfield was engaged with the knowledge of Spurr in thus misusing the credits and funds of the bank on cotton and stock exchanges in speculations in his own or other persons' interest, the jury are at liberty to find in that a reason why Mr. Spurr should not have confidence in Mr. Porterfield's integrity and fidelity to the interests of the bank, and why Mr. Spurr would in the exercise of his own duties have exercised a closer scrutiny of the dealings of Dobbins & Dazy with the bank, especially if he had reason to suppose that firm was engaged in such speculations.

The defendant is not on trial directly for his complicity with such previous speculations and misuse of the bank's property in them, and proof of them has been admitted, and is to be applied by the jury solely upon the question of the knowledge and intent of the respondent, when he made the false certifications of the checks mentioned in the indictment.

Mr. Porterfield has been called to the stand as a witness. The court has been requested to instruct you in regard to the proper weight to be given to his testimony. He is a competent witness as a matter of law. There are, besides, this certain rules which have been thought to be useful in sifting the testimony of accomplices and fixing its weight. They are not of binding force as rules of law but are to assist the judgment in forming prudent conclusions, for in the end, the jury must form their judgment of such testimony upon all the circumstances and facts proven before them, and the impressions which all collectively produce upon their minds.

Some of the rules just referred to are, that such testimony, that is, the testimony of an accomplice, is to be taken and regarded with caution and that it is not safe to act upon it unless it be confirmed

in some material part of the witness' testimony. If it be thus confirmed, then the jury may act upon it throughout, if upon the whole they find it worthy of credit. The situation of the witness at the time of testifying is to be regarded; whether before his own sentence, and under expectation of gain from giving the testimony, or whether he has nothing to gain from such testimony or any other circumstances which the jury may see is properly to be regarded in estimating its weight.

Two witnesses have been called to testify that Mr. Porterfield on certain occasions made statements inconsistent with his present testimony. In considering that testimony you will naturally consider, not only what was the actual admission made, but also the
156 circumstances and for what motive the admission or statement was made. Has the admission been correctly related? Did it go beyond a statement that he was the principal and had been the leader in wrong doing, and that he had carried Spurr on the outside of the transactions as respects the entries in the books of the bank, or did he go further and state that Spurr had nothing whatever to do with any of the wrong things which had been done, and in considering the accuracy of the relations made by one of the witnesses who has testified you may properly consider any such zeal or interest in the obtaining of it as the testimony in your view justly warrants you in believing. If his statements then made are correctly reported, then the motive of Porterfield in making them may properly be inquired into. Did he make them, knowing that his own doom was sealed; because he was willing to shield Spurr, or did he make the statements under pressure of his conscience and because they were true? But whatever Mr. Porterfield may have said on these occasions is not to be taken as proof of the fact, but only for the purpose of affecting Porterfield's credit, and for every other purpose such statements as detailed here are mere hearsay. This distinction it is proper for the jury to understand and apply. The evidence as to what Porterfield said on the occasions to which those witnesses refer is not to be received as evidence of the facts which he may have then stated, but is only receivable and to be considered by you as evidence tending to touch the question of credit which you should give to his testimony. Whatever credit his testimony delivered here may be entitled to, the question remains for you to settle upon all the evidence whether the defendant Spurr in certifying these checks acted in good faith, and without any intent to do that which the law forbids and which he must be presumed to know was unlawful, namely, the certifying of the check as good when the maker of it has no funds in the bank to meet it. If he acted in good faith, believing that the makers of the checks had funds in the bank to pay them he should be acquitted. If he certified the checks, either knowing that the funds to respond were not in the bank and that the making of the check was unwarranted, or having in his conscience good reason for believing that such was the fact, purposely refrained from inquiry, then the charge against him is made out. The facts which are charged as constituting his guilt must be proven beyond a reasonable doubt. That is to say, so

proven as to persuade a clear and abiding conviction of the defendant's guilt, such conviction as is not shaken by any reason-
157 able doubt, grounded upon the testimony. If you are so convinced of his guilt, he should be convicted, otherwise not.

I have thus presented to you what seems to the court the salient features of the case, and I now leave it to you to decide according to your convictions of the truth under the solemnity of your oaths, and that inflexible sense of duty which every right-minded juror must experience in determining an issue of such grave import to the public on the one hand and the private citizen on the other.

The jurors have in mind the dates and amounts of these several checks? Would they desire a brief abstract of them?

(By a JUROR): And the state of the accounts at the time those checks were certified; we would like to have an abstract of that.

(By the COURT:) You can retire, gentlemen, and we will see to the sending to you, in the care of the bailiff, of these details.

United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record printed in accordance with stipulation of counsel and used at the hearing in this court together with the proceedings of this court, in the case of Marcus A. Spurr *vs.* The United States of America, No. 502, October term, 189–, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the sixth circuit, at the city of Cincinnati, Ohio, this 19 day of Oct., 1898.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

157½ Endorsed on cover: Case No. 17,033. U. S. C. C. of appeals, 6th circuit. Term No., 448. Marcus A. Spurr, petitioner, *vs.* The United States. Exhibit to petition for writ of certiorari. Filed October 24, 1898.

158 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the sixth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Marcus A. Spurr is plaintiff in error and The United States

is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the middle district of Tennessee, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United
159 States, do hereby command you that you send, without delay, to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eighth day of November, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

I return foregoing writ this 13th day of December, 1898, pursuant to a stipulation of counsel filed this day in the clerk's office of the United States circuit court of appeals for the sixth judicial circuit. Said stipulation reads as follows:

"It is stipulated and agreed by counsel for petitioner and counsel for respondent in the above-entitled case that certified copies of the following shall constitute the return of the clerk of the United States circuit court of appeals for the sixth circuit to the writ of certiorari issued to that court in the above-entitled case from the Supreme Court of the United States, viz:

I.

The indictments Nos. 7994, 8078, and 8139, to be copied in that order, it being the order in which they were fastened together at the time of the trial which resulted in the verdict of guilty.

II.

The order made by the circuit court of the United States for the middle district of Tennessee on May 22, 1894, consolidating said indictments.

III.

The entry on the minutes of said circuit court, dated March 30, 1896, showing the empanelling of the jury that rendered the verdict against the petitioner.

IV.

The printed part of the record used on the hearing of said case in said circuit court of appeals.

V.

All proceedings that were had in said case in said circuit court of appeals, including the opinion delivered by said court.

Signed this 10th day of December, 1898.

JNO A. PITTS,
ALBERT H. HORTON,
B. P. WAGGENER,
Attorneys for Petitioner,
By JNO. A. PITTS.
J. K. RICHARDS,
Solicitor General,
By A. M. TILLMAN,
U. S. Attorney for the Middle District of Tennessee."

In testimony whereof I hereby subscribe my name and affix the seal of the U. S. circuit court of appeals for the sixth circuit, at Cincinnati, O., this 13th day of December, 1898.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of said Court.

160 [Endorsed:] Case No. 17,033. Supreme Court of the United States. No. 448. October term, 1898. Marcus A. Spurr *vs.* The United States. Writ of certiorari and return. Filed Dec. 15, 1898.

161 Supreme Court of the United States.

MARCUS A. SPURR
vs.
THE UNITED STATES. } No. 448.

It is hereby stipulated by counsel for both parties that the clerk of the circuit court of appeals, at Cincinnati, may omit the matter embraced in paragraphs IV and V in stipulation of Dec. 10th, 1898, filed with him in this cause, said matter having heretofore been certified by him to the Supreme Court, and that he certify only such parts of the record as are specified in paragraphs I, II, and III of said stipulation of Dec. 10th, 1898.

This Feb'y 20th, 1899.

ALBERT H. HORTON,
BAILEY P. WAGGENER,
JNO. A. PITTS,
Attorneys for Marcus A. Spurr.
ED. BAXTER,
Of Counsel for U. S.
JOHN G. THOMPSON,
Ass't Att'y Gen'l.

Sections I, II, and III of the stipulation of Dec. 10, 1898, are as follows:

162 "I. The indictments Nos. 7994, 8078, and 8139 to be copied in that order, it being the order in which they were fastened together at the time of the trial, which resulted in the verdict of guilty.

"II. The order made by the circuit court of the United States for the middle district of Tennessee on May 22, 1894, consolidating said indictments.

"III. The entry on the minutes of said circuit court dated March 30, 1896, showing the empanelling of the jury that rendered the verdict against the petitioner."

ALBERT H. HORTON,
BAILEY P. WAGGENER,
JNO. A. PITTS,
Att'ys for Petitioner.
ED. BAXTER,
Of Counsel for U. S.
JOHN G. THOMPSON,
Ass't Att'y Gen'l.

163 [Endorsed:] File No. 17,033. Supreme Court U. S., October term, 1898. Term No., 448. Marcus A. Spurr, petitioner, *vs.* The United States. Stipulation that clerk of circuit court of appeals may omit certain parts of record, &c. Filed Feb. 20, 1899.

164 In the Supreme Court of the United States.

MARCUS A. SPURR
v.
THE UNITED STATES. } No. 502.

Supplemental Record.

165 Indictment No. 7994.

THE UNITED STATES OF AMERICA,
Middle District of Tennessee.

Circuit Court of the United States, April Term, 1893.

1st Count.

The grand jurors for the United States of America and the district aforesaid, having been duly summoned, elected, empanneled, sworn, and charged to enquire for the body of the district aforesaid, upon their oaths aforesaid present that on the 17th day of April, 1893, and on divers days before said day, Marcus A. Spurr was president of the Commercial National Bank of Nashville, Tenn., at Nashville, in the State of Tennessee, within said district, a national banking association created, organized, and established under and by virtue of the laws of the United States, embraced in title No. 62 of the Revised Statutes of the United States and the acts of Con-

gress amendatory thereof, and then and there carrying on a banking business as such The Commercial National Bank of Nashville, Tennessee, in the city of Nashville aforesaid.

That on January 3, 1893, and on divers other days to the grand jury unknown, J. P. Dobbins and George A. Dazey, partners as Dobbins & Dazey, a mercantile company trading at Nashville aforesaid, were dealers with and customers of said Commercial national bank.

That then and there, on January 3, 1893, aforesaid, said company of Dobbins & Dazey drew a check upon said Commercial national bank, being No. 1065, for the amount of $40,000, to the order
166 of J. T. Howell, cashier, and notwithstanding they, the said Dobbins & Dazey, as he, the said Marcus A. Spurr, well knew, did not have on deposit with said Commercial national bank an amount of money equal to the amount specified in said check, but, on the contrary, were indebted to the said Commercial national bank in a large sum of money, he, the said Marcus A. Spurr, being then president of said banking association, without the knowledge and consent of the bank and its board of directors and committees, wilfully certified said check as good by writing thereon the words "Good. M. A. Spurr, p't," and the said check was thereupon presented at and paid to the order of said J. T. Howell, cashier, by the said Commercial national bank.

And so the grand jurors aforesaid upon their oaths aforesaid present that in the manner and at the time aforesaid he, the said Marcus A. Spurr, being then an officer, to wit, the president, of said Commercial national bank, unlawfully, wilfully, and knowingly and without the consent of the bank and its board of directors and committees, certified a — drawn upon the said Commercial national bank by said company, to wit, the said Dobbins & Dazey, — they, the said Dobbins & Dazey, and he, the said Marcus A. Spurr, well knew, not having at said time on deposit with the said Commercial national bank an amount of money equal to the amount specified in said check, contrary to the statute in such cases made and provided and against the peace and dignity of the United States.

2nd Count.

And the grand jurors aforesaid upon their oaths aforesaid do further present that on the 17th day of April, 1893, and on divers other days before said day, Marcus A. Spurr was president of the Commercial National Bank of Nashville, Tennessee, at Nashville,
in the State of Tennessee, within said district, a national
167 banking association created, organized, and established under and by virtue of the laws of the United States, embraced in title No. 62 of the Revised Statutes of the United States and the acts of Congress amendatory thereof, and then and there carrying on a banking business as such The Commercial National Bank of Nashville, Tennessee, in the city of Nashville aforesaid.

That on December 17, 1892, and on divers other days to the grand jury unknown, J. P. Dobbins & George A. Dazey, partners

as Dobbins & Dazey, a mercantile company trading at Nashville aforesaid, were dealers with and customers of said Commercial national bank.

That then and there and on December 17, 1892, said company of Dobbins & Dazey drew a check upon said Commercial national bank, being No. 1007, for the amount of $31,000, to the order of J. T. Howell, cashier; that they, the said Dobbins & Dazey, as he, the said Marcus A. Spurr, well knew, did not then have on deposit with said Commercial national bank an amount of money equal to the amount specified in said check; that thereupon, to wit, on said 17th of December, 1892, he, the said Marcus A. Spurr, being then president of the said Commercial national bank, at Nashville and within the district aforesaid, without the consent and knowledge of the bank and its board of directors and committees, wilfully certified said check as good by writing thereon the words "Good. M. A. Spurr, p't," and the said check was thereupon presented at and paid to the order of said J. T. Howell, cashier, by the said Commercial national bank.

And so the grand jurors aforesaid upon their oaths aforesaid present that he, the said Marcus A. Spurr, unlawfully, wilfully, and knowingly, in the manner and at the time and place aforesaid, being then an officer, to wit, the president, of said Commercial
168 national bank, without the knowledge of the bank, its board of directors and committees, certified a check drawn upon said Commercial national bank by said company, to wit, the said Dobbins & Dazey, they, the said Dobbins & Dazey, as he, the said Marcus A. Spurr, well knew, not having at said time on deposit with said Commercial national bank an amount of money equal to the amount specified in said check, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States.

3rd Count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that on the 17th day of April, 1893, and on divers days before said day, Marcus A. Spurr was president of the Commercial National Bank of Nashville, Tennessee, at Nashville, in the State of Tennessee, within said district, a national banking association created, organized, and established under and by virtue of the laws of the United States, embraced in title No. 62 of the Revised Statutes of the United States and the acts of Congress amendatory thereof, and then and there carrying on a banking business as such The Commercial National Bank of Nashville, Tennessee, in the city of Nashville aforesaid.

That on December 9, 1892, and on divers other days to the grand jurors unknown, J. P. Dobbins and George A. Dazey, partners as Dobbins & Dazey, a mercantile company trading at Nashville aforesaid, were dealers with and customers of said Commercial national bank.

That on December 9, 1892, aforesaid, said company of Dobbins & Dazey were indebted to the Commercial national bank in a large

amount of money, to wit, $88,225.00, more or less, the exact amount being to the grand jurors unknown.

169 That the said Dobbins & Dazey, on the said 9th day of December, 1892, drew a check, being No. 936, to the order of J. T. Howell, cashier, on said Commercial national bank for the sum of $15,000.00.

That they, the said Dobbins & Dazey, as he, the said Marcus A. Spurr, well knew, did not then have on deposit with said Commercial national bank an amount equal to the aforesaid sum of $15,000.00.

That thereupon, to wit, on the said December 9th, 1892, the said Marcus A. Spurr, in Nashville, within said district, without the consent and knowledge of the bank and its board of directors and committees, wilfully certified said check so drawn by Dobbins & Dazey as aforesaid as good by writing thereon the words "Good. M. A. Spurr, president," and the same was paid to the order of said J. T. Howell by the said Commercial national bank.

And so the grand jurors aforesaid upon their oaths aforesaid present that, in the manner aforesaid and at the time and place aforesaid, he, the said Marcus A. Spurr, being then an officer, to wit, the president, of said Commercial national —, without the knowledge and consent of the bank and its board of directors and committees, unlawfully, wilfully, and knowingly certified a check drawn upon said Commercial national bank by said company, to wit, the said Dobbins & Dazey, they, the said Dobbins & Dazey, as he, the said Marcus A. Spurr, well knew, not having at said time on deposit with the said Commercial national bank an amount of money equal to the amount specified in said check, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States.

170 *4th Count.*

And the grand jurors aforesaid upon their oaths aforesaid do further present that on the 17th day of April, 1893, and on divers days before said day, the exact days being to the grand jurors unknown, Marcus A. Spurr was president of the Commercial National Bank of Nashville, Tennessee, at Nashville, in the State of Tennessee, within said district, a national banking association created, organized, and established under and by virtue of the laws of the United States, embraced in title No. 62 of the Revised Statutes of the United States and the acts of Congress amendatory thereof, and then and there carrying on a banking business as such The Commercial National Bank of Nashville, Tennessee, in the city of Nashville aforesaid.

That on the day and days and at the place aforesaid J. P. Dobbins and George A. Dazey, partners as Dobbins & Dazey, a mercantile company trading at Nashville aforesaid, were dealers with and customers of said Commercial national bank.

That then and there and on the 3rd day of January, 1893, said company of Dobbins & Dazey drew a check upon said Commercial national bank, being No. 1065, for the amount of $40,000.00, to the

order of J. T. Howell, cashier, and, notwithstanding they, the said Dobbins & Dazey, as he, the said Marcus A. Spurr, well knew, did not then have on deposit with the said Commercial national bank an amount of money equal to the amount specified in said check, but, on the contrary, were indebted to said Commercial national bank in a large sum of money, the exact amount to the grand jury being unknown, he, the said Marcus A. Spurr, being then president of said Commercial national bank, without the consent of the bank, its board of directors and committees, wilfully certified said check No. 1065, to the order of J. T. Howell, cashier, so as aforesaid drawn by Dobbins & Dazey on said 3rd of January, 1893, to be
171 good by writing thereon the words "Good. M. A. Spurr, p't," and the amount of said check was thereupon paid to the order of said J. T. Howell, cashier, by the said commercial national bank.

And so the grand jurors aforesaid upon their oaths aforesaid present that in the manner and at the time and place aforesaid he, the said Marcus A. Spurr, being then an officer, to wit, the president, of said Commercial national bank, did wilfully violate the provisions of section 5208, United States Revised Statutes, and did, without the consent of the bank, its board of directors and committees, wilfully, unlawfully, and knowingly certify a check drawn upon said Commercial national bank by said company, to wit, the said Dobbins & Dazey, they, the said Dobbins & Dazey, as he, the said Marcus Spurr, well knew, not having at said time on deposit with the said Commercial national bank an amount of money equal to the amount specified in the said check, contrary to the statute in such cases made and provided and against the peace and dignity of the United States.

JOHN RUHM,
U. S Attorney, Middle District of Tennessee.

Endorsed: Witnesses W. H. Knox, W. J. Bond, Geo. Trabue, J. T. Howell called and sworn by me to give evidence before the grand jury on the within indictment this 20th day of April, 1893, and on whose evidence this indictment was found. Travis Winham, foreman of the grand jury. A true bill. Travis Winham, foreman of the grand jury, Davidson county. Amended. The Commercial National Bank of Nashville, Tenn., instead — Commercial
172 national bank. Travis Winham, foreman grand jury. Travis Winham, foreman grand jury. July 26, 1893. Filed April 20, 1893. H. M. Doak, cl'k, by E. L. Doak, D. C.

Indictment No. 8078.

THE UNITED STATES OF AMERICA, }
Middle District of Tennessee, }

Circuit Court of the United States, April Term, 1893.

1st Count.

The grand jurors for the United States of America and the district aforesaid, having been duly summoned, elected, empanneled, sworn, and charged to inquire for the body of the district aforesaid, upon their oaths aforesaid present that on the 17th day of April, 1893, and on divers days before said day, Marcus A. Spurr was president of the Commercial National Bank of Nashville, Tennessee, at Nashvillee, in the State of Tennesse, within said district, a national banking association created, organized, and established under and by virtue of the laws of the United States, embraced in title No. 62 of the Revised Statutes of the United States and the acts of Congress amendatory thereof, and then and there carrying on a banking business as such The Commercial National Bank of Nashville, Tennessee, in the city of Nashville aforesaid.

That on February 27th, 1893, and on divers other days to the grand jury unknown, J. P. Dobbins and George A. Dazey, partners as Dobbins & Dazey, a mercantile company trading at Nashville aforesaid, were dealers with and customers of said The Commercial National Bank of Nashville, Tennessee.

173 That then and there, on February 27th, 1893, aforesaid, said company of Dobbins & Dazey drew a check upon said The Commercial National Bank of Nashville, Tennessee, being No. 1242, for the amount of $41,000.00, to the order of A. W. Harris, cashier, and notwithstanding they, the said Dobbins & Dazey, as he, the said Marcus A. Spurr, well knew, did not have on deposit with said The Commercial National Bank of Nashville, Tennessee, an amount of money equal to the amount specified in said check, but, on the contrary, were indebted to said The Commercial National Bank of Nashville, Tennessee, in a large sum of money, he, the said Marcus A. Spurr, being then president of said banking association, without the knowledge and consent of the bank and its board of directors and committees, wilfully certified said check as good by writing thereon the words "Good. M. A. Spurr, p't," and the said check was thereupon presented at and paid to the order of said A. W. Harris, cashier, by the said The Commercial National Bank of Nashville, Tennessee.

And so the grand jurors aforesaid upon their oaths aforesaid present that in the manner aforesaid and at the time and place aforesaid he, the said Marcus A. Spurr, being then an officer, to wit, the president, of said The Commercial National Bank of Nashville, Tennessee, unlawfully, wilfully, and knowingly and without the consent of the bank and its board of directors and committees, certified a check drawn upon said The Commercial National Bank of Nash-

ville, Tennessee, by said company, to wit, the said Dobbins & Dazey, they, the said Dobbins & Dazey, as he, the said Marcus A. Spurr, well knew, not having at said time on deposit with the said The Commercial National Bank of Nashville, Tennessee, an amount of money equal to the amount specified in said check, contrary to the statute in such cases made and provided and against the peace and dignity of the United States.

174 *2nd Count.*

And the grand jurors aforesaid upon their oaths aforesaid do further present that on the 17th day of April, 1893, and on divers days before said day, Marcus A. Spurr was president of the Commercial National Bank of Nashville, Tennessee, at Nashville, in the State of Tennessee, within said district, a national banking association created, organized, and established under and by virtue of the laws of the United States, embraced in title No. 62 of the Revised Statutes of the United States and the acts of Congress amendatory thereof, and then and there carrying on a banking business as such The Commercial National Bank of Nashville, Tennessee, in the city of Nashville aforesaid.

That on February 13th, 1893, and on divers other days to the grand jury unknown, J. P. Dobbins and George A. Dazey, partners as Dobbins & Dazey, a mercantile company trading at Nashville aforesaid, were dealers with and customers of said The Commercial National Bank of Nashville, Tennessee.

That then and there and on February 13th, 1893, said company of Dobbins & Dazey drew a check upon said The Commercial National Bank of Nashville, Tennessee, being No. 1209, for the amount of $9,641.95, to the order of J. T. Howell, cashier; that they, the said Dobbins & Dazey, as he, the said Marcus A. Spurr, well knew, did not then have on deposit with said The Commercial National Bank of Nashville, Tennessee, an amount of money equal to the amount specified in said check; that thereupon, to wit, on the said 13th of February, 1893, he, the said Marcus A. Spurr, being then president of said The Commercial National Bank of Nashville, Tennessee, at Nashville and within the district aforesaid, without the consent and knowledge of the bank and its board of directors and committees,

175 wilfully certified said check as good by writing thereon the words "Good. M. A. Spurr, p't," and the said check was thereupon presented at and paid to the order of said J. T. Howell, cashier, by the said The Commercial National Bank of Nashville, Tennessee.

And so the grand jurors aforesaid upon their oaths aforesaid present that he, the said Marcus A. Spurr, unlawfully, wilfully, and knowingly, in the manner and at the time and place aforesaid, being then an officer, to wit, the president, of said The Commercial National Bank of Nashville, Tennessee, without the knowledge of the bank and its board of directors and committees, unlawfully, knowingly, and wilfully certified a check drawn upon said The Commercial National Bank of Nashville, Tennessee, by said com-

pany, to wit, the said Dobbins & Dazey, they, the said Dobbins & Dazey, as he, the said Marcus A. Spurr, well knew, not having at said time on deposit with the said The Commercial National Bank of Nashville, Tennessee, an amount of money equal to the amount specified in said check, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States.

JOHN RUHM,
U. S. Attorney, Middle District of Tennessee.

Endorsed: Witnesses E. P. Moxey, A. B. Fisher, W. D. Fuller called and sworn by me to give evidence before the grand jury on the within indictment this the 26th day of July, 1893, and on whose evidence this indictment was found. Travis Winham, foreman of the grand jury. A true bill. Travis Winham, foreman of the grand jury, Davidson county. John Ruhm, U. S. district attorney. Filed July 27, 1893. H. M. Doak, clerk, by E. L. Doak, D. C.

176 *Indictment No.* 8139.

THE UNITED STATES OF AMERICA, }
Middle District of Tennessee. }

Circuit Court of the United States, April Term, 1893.

1st Count.

The grand jurors of the United States of America and the district aforesaid, having been duly summoned, elected, empannelled, sworn, and charged to inquire for the body of the district, upon their oaths aforesaid present that on the 17th day of April, 1893, and on divers other days before said day, the exact days being to the grand jurors unknown, Marcus A. Spurr was president of the Commercial National Bank of Nashville, Tennessee, at Nashville, in the State of Tennessee, within said district, a national banking association created, organized, and established under and by virtue of the laws of the United States, embraced in title No. 62 of the Revised Statutes of the United States and the acts of Congress amendatory thereof, and then and there carrying on a banking business as such The Commercial National Bank of Nashville, Tennessee, in the city of Nashville, within said district.

That on said day and days J. G. Dobbins and George A. Dazey, partners as Dobbins & Dazey, a mercantile company trading at Nashville aforesaid, were dealers with and customers of said The Commercial National Bank of Nashville, Tennessee, that they, The said Dobbins & Dazey, were then and there, as he the said Marcus A. Spurr, being then and there president, as aforesaid, then and there well knew, indebted to the said The Commercial National Bank of Nashville, Tennessee, in large sums of money, the exact
177 amount of the indebtedness being to the grand jurors unknown, and they—that is to say, the said Robbins and Dazey—had then and there, as he, the said Marcus A. Spurr, also

well knew, no money and moneys on deposit with The said the Commercial National Bank of Nashville, Tennessee.

That then and there, to wit, on the said day and days aforesaid, the said Dobbins & Dazey aforesaid drew their check to the order of J. T. Howell, cashier, upon the Commercial National Bank of Nashville, Tennessee, aforesaid, which is in the following words and figures, to wit:

No. 936. NASHVILLE, TENN., *Dec.* 9, 1892.

Commercial national bank

Pay to J. T. Howell, cashier, or order fifteen thousand dollars.
$15,000.00. DOBBINS & DAZEY.

That the said Marcus A. Spurr, being then and there president of said The Commercial National Bank of Nashville, Tennessee, and as such president being authorized to certify checks drawn on said bank, did then and there wilfully and unlawfully and well knowing that the said Dobbins & Dazey did not then and there have on deposit with said bank an amount of money equal to the amount specified in said check *did then and there* certify the said check by writing on the face thereof the words "Good. M. A. Spurr, p's't."

And so the grand jurors aforesaid upon their oaths aforesaid present that in the manner and at the time and within the district aforesaid the said Marcus A. Spurr, being then and there president of the Commercial National Bank of Nashville, Tennessee, aforesaid, did wilfully and unlawfully violate the provisions of an act entitled "An act in reference to certifying checks by national banks," approved March 3, 1869, being section 5208 of the Revised Statutes of the United States, and did wilfully and unlawfully certify
178 a check drawn upon the said The Commercial National Bank of Nashville, Tennessee, by Dobbins & Dazey, a company doing business at Nashville, within said district, the drawers of said check aforesaid, to wit, Dobbins & Dazey, as he, the said Marcus A. Spurr aforesaid, then and there well knew, not then and there having on deposit with said The Commercial National Bank of Nashville, Tennessee, an amount of money equal to the amount specified in said check, contrary to the statute in such cases made and provided and against the peace and dignity of the United States.

2nd Count.

And the grand jurors aforesaid upon their oaths aforesaid do further present that on the 17th day of April, 1893, and on divers days before said day, the exact days being to the grand jurors unknown, Marcus A. Spurr was president of the Commercial National Bank of Nashville, Tennessee, at Nashville, in the State of Tennessee, within said district, a national banking association created, organized, and established under and by virtue of the laws of the United States, embraced in title No. 62 of the Revised Statutes of the United States and the acts of Congress amendatory thereof

and then and there carrying on a banking business as such The Commercial National Bank of Nashville, Tennessee, in the city of Nashville, within said district.

That on said day and days J. G. Dobbins and George A. Dazey, partners as Dobbins & Dazey, a mercantile company, trading at Nashville aforesaid, were dealers with and customers of said The Commercial National Bank of Nashville, Tennessee; that they, the said Dobbins & Dazey, were then and there, as he, the said Marcus A. Spurr, being then and there president aforesaid, then and there well knew, indebted to the said The Commercial
179 National Bank of Nashville, Tennessee, in large sums of money, the exact amount of the indebtedness being to the grand jurors unknown, and they—that is to say, the said Dobbins & Dazey—had then and there, as he, the said Marcus A. Spurr, also well knew, no money and moneys on deposit with said The Commercial National Bank of Nashville, Tennessee.

That then and there, to wit, on the said day and days aforesaid, the said Dobbins & Dazey aforesaid drew their check to the order of J. T. Howell, cashier, upon the Commercial National Bank of Nashville, Tennessee, aforesaid, which is in the words and figures, to wit:

No. 1007. NASHVILLE, TENN., *Dec.* 17, 1892.

Commercial national bank

Pay to the order of J. T. Howell, cashier, thirty-one thousand dollars.

$31,000.00. DOBBINS & DAZEY.

[On the margin:] Dobbins & Dazey, Nashville, Tenn.

That said Marcus A. Spurr, being then and there president of said The Commercial National Bank of Nashville, Tennessee, and as such president being authorized to certify checks drawn on said bank, did then and there wilfully and unlawfully and well knowing that said Dobbins & Dazey did not then and there have on deposit with said bank an amount of money equal to the amount specified in said check *did then and there* certify the said check by writing on the face thereof the words, "Good. M. A. Spurr, p't."

And so the grand jurors aforesaid upon their oaths aforesaid present that in the manner and at the time and within the district aforesaid the said Marcus A. Spurr, being then and there president of the Commercial National Bank of Nashville, Tennessee, aforesaid, did wilfully and unlawfully violate the provisions of an act entitled
"An act in reference to certifying checks by national banks,"
180 approved March 3, 1869, being section 5208 of the Revised Statutes of the United States, and did wilfully and unlawfully certify a check drawn upon the said The Commercial National Bank of Nashville, Tennessee, by Dobbins & Dazey, a company doing business at Nashville, within said district, the drawers of said check aforesaid, to wit, Dobbins & Dazey, as he, the said Marcus A. Spurr aforesaid, then and there well knew, not then and there hav-

ing on deposit with said The Commercial National Bank of Nashville, Tennessee, an amount of money equal to the amount specified in said check, contrary to the statute in such cases made and provided and against the peace and dignity of the United States.

3rd Count.

And the grand jurors aforesaid upon their oaths aforesaid do further present that on the 17th day of April, 1893, and on divers other days before said day, the exact days being to the grand jurors unknown, Marcus A. Spurr was president of the Commercial National Bank of Nashville, Tennessee, at Nashville, in the State of Tennessee, within said district, a national banking association created, organized, and established under and by virtue of the laws of the United States, embraced in title No. 62 of the Revised Statutes of the United States and the acts of Congress amendatory thereof, and then and there carrying on a banking business as such The Commercial National Bank of Nashville, Tennessee, in the city of Nashville, within said district.

That on said day and days J. G. Dobbins and George A. Dazey, partners as Dobbins & Dazey, a mercantile company, trading at Nashville aforesaid, were dealers with and customers of said The Commercial National Bank of Nashville, Tennessee; that they, the said Dobbins & Dazey, were then and there, as he, the said Marcus A. Spurr, being then president aforesaid, then and there well
181 knew, indebted to the said The Commercial National Bank of Nashville, Tennessee, in large sums of money, the exact amount of the indebtedness being to the grand jurors unknown, and they—that is to say, the said Dobbins & Dazey—had then and there, as he, the said Marcus A. Spurr, also well knew, no money and moneys on deposit with said The Commercial National Bank of Nashville, Tennessee.

That then and there, to wit, on the said day and days aforesaid, the said Dobbins & Dazey aforesaid drew their check to the order of J. T. Howell, cashier, upon the Commercial National Bank of Nashville, Tennessee, aforesaid, which is in the words and figures, to wit:

No. 1065. NASHVILLE, TENN., *Jan'y* 3, 1893.

Commercial national bank

Pay to the order of J. T. Howell, cashier, forty thousand dollars.
$40,000.00. DOBBINS & DAZEY.

[On the margin:] Dobbins & Dazey, Nashville, Tenn.

That said Marcus A. Spurr, being then and there president of said The Commercial National Bank of Nashville, Tennessee, and as such president being authorized to certify checks drawn on said bank, did then and there wilfully and unlawfully and well knowing that the said Dobbins & Dazey did not then and there have on deposit with said bank an amount of money equal to the amount specified

in said check *did then and there* certify the said check by writing on the face thereof the words "Good. M. A. Spurr, p't."

And so the grnad jurors aforesaid upon their oaths aforesaid present that in the manner and at the time and within the district aforesaid the said Marcus A. Spurr, being then and there president of the Commercial National Bank of Nashville, Tennessee, aforesaid,

182 did wilfully and unlawfully violate the provisions of an act entitled "An act in reference to certifying checks by national banks," approved March 3, 1869, being section 5208 of the Revised Statutes of the United States, and did wilfully and unlawfully certify a check drawn upon the said The Commercial National Bank of Nashville, Tennessee, by Dobbins & Dazey, a company doing business at Nashville, within said district, the drawers of the check aforesaid, to wit, Dobbins & Dazey, as he, the said Marcus A. Spurr aforesaid, then and there well knew, not then and there having on deposit with said The Commercial National Bank of Nashville, Tennessee, an amount of money equal to the amount specified in said check, contrary to the statute in such cases made and provided and against the peace and dignity of the United States.

4th Count.

And the grand jurors aforesaid upon their oaths aforesaid do further present that on the 17th day of April, 1893, and on divers other days before said day, the exact days being to the grand jurors unknown, Marcus A. Spurr was president of the Commercial National Bank of Nashville, Tennessee, at Nashville, in the State of Tennessee, within said district, a national banking association created, organized, and established under and by virtue of the laws of the United States embraced in title No. 62 of the Revised Statutes of the United States and the acts of Congress amendatory thereof, and then and there carrying on a banking business as such The Commercial National Bank of Nashville, Tennessee, in the city of Nashville, within said district.

That on said day and days J. G. Dobbins and George A. Dazey, partners as Dobbins & Dazey, a mercantile company trading at Nashville aforesaid, were dealers with and customers of said The Commercial National Bank of Nashville, Tennessee; that they, the said Dobbins & Dazey, were then and there, as he, the said Marcus A. Spurr, being then and there president aforesaid, then and

183 there well knew, indebted to the said The Commercial National Bank of Nashville, Tennessee, in large sums of money, the exact amount of the indebtedness being to the grand jurors unknown, and they—that is to say, the said Dobbins & Dazey—had then and there, as he, the said Marcus A. Spurr, also well knew, no money and moneys on deposit with the said The Commercial National Bank of Nashville, Tennessee.

That then and there, to wit, on the said day and days aforesaid, the said Dobbins & Dazey aforesaid drew their check to the order of A. W. Harris, cashier, upon the Commercial National Bank of Nash-

ville, Tennessee, aforesaid, which is in the following words and figures, to wit:

No. 1242. NASHVILLE, TENN., *Feb.* 27, 1893.

Commercial national bank

Pay to the order of A. W. Harris, cashier, forty-one thousand dollars.

$41,000.00. DOBBINS & DAZEY.

[On the margin:] Dobbins & Dazey, Nashville, Tenn.

That the said Marcus A. Spurr, being then and there president of said The Commercial National Bank of Nashville, Tennessee, and as such president being authorized to certify checks drawn on said bank, did then and there wilfully and unlawfully and well knowing that the said Dobbins & Dazey did not then and there have on deposit with said bank an amount of money equal to the amount specified in said check *did then and there* certify the said check by writing on the face thereof the words "Good. M. A. Spurr, p't."

And so the grand jurors aforesaid upon their oaths aforesaid present that in the manner and at the time and within the district aforesaid the said Marcus A. Spurr, being then and there president of the Commercial National Bank of Nashville, Tennessee, aforesaid, did wilfully and unlawfully violate the provision of an act
184 entitled "An act in reference to certifying checks by national banks," approved March 3, 1869, being section 5208 of the Revised Statutes of the United States, and did wilfully and unlawfully certify a check drawn upon the said The Commercial National Bank of Nashville, Tennessee, by Dobbins & Dazey, a company doing business at Nashville, within said district, the drawers of said check aforesaid, to wit, Dobbins & Dazey, as he, the said Marcus A. Spurr aforesaid, then and there well knew, not then and there having on deposit with said The Commercial National Bank of Nashville, Tennessee, an amount of money equal to the amount specified in said check, contrary to the statute in such cases made and provided and against the peace and dignity of the United States.

5th Count.

And the grand jurors aforesaid upon their oaths aforesaid do further present that on the 17th day of April, 1893, and on divers days before said day, the exact days being to the grand jurors unknown, Marcus A. Spurr was president of the Commercial National Bank of Nashville, Tennessee, at Nashville, in the State of Tennessee, within said district, a national banking association created, organized, and established under and by virtue of the laws of the United States embraced in title No. 62 of the Revised Statutes of the United States and the acts of Congress amendatory thereof, and then and there carrying on a banking business as such The Commercial National Bank of Nashville, Tennessee, in the city of Nashville, within said district.

That on the said day and days J. G. Dobbins and George A. Dazey, partners as Dobbins & Dazey, a mercantile company trading at Nashville aforesaid, were dealers with and customers of said The Commercial National Bank of Nashville, Tennessee; that they, the said Dobbins & Dazey, were then and there, as he, the said
185 Marcus A. Spurr, being then and there president aforesaid, then and there well knew, indebted to the said The Commercial National Bank of Nashville, Tennessee, in large sums of money, the exact amount of the indebtedness being to the grand jurors unknown, and they—that is to say, the said Dobbins & Dazey—had then and there, as he, the said Marcus A. Spurr, also well knew, no money and moneys on deposit with said The Commercial National Bank of Nashville, Tennessee.

That then and there, to wit, on the said day and days aforesaid, the said Dobbins & Dazey aforesaid drew their check to the order of J. T. Howell, cashier, upon the Commercial National Bank of Nashville, Tennessee, aforesaid, which is in the following words and figures, to wit:

No. 1209. NASHVILLE, TENN., *Feb.* 13, 1893.

Commercial national bank

Pay to the order of J. T. Howell, cashier, ninety-six hundred forty-one $\frac{95}{100}$ dollars.

$9,641.95. DOBBINS & DAZEY.

[On the margin:] Dobbins & Dazey, Nashville, Tenn.

That the said Marcus A. Spurr, being then and there president of said The Commercial National Bank of Nashville, Tennessee, and as such president being authorized to certify checks drawn on said bank, did then and there wilfully and unlawfully and well knowing that the said Dobbins & Dazey did not then and there have on deposit with said bank an amount of money equal to the amount specified in said check *did then and there* certify the said check by writing on the face thereof the words "Good. M. A. Spurr, p't."

And so the grand jurors aforesaid upon their oaths aforesaid present that in the manner and at the time and within the district aforesaid the said Marcus A. Spurr, being then and there president of the Commercial National Bank of Nashville, Tennessee,
186 aforesaid, did wilfully and unlawfully violate the provisions of an act entitled "An act in reference to certifying checks by national banks," approved March 3, 1869, being section 5208 of the Revised Statutes of the United States, and did wilfully and unlawfully certify a check drawn upon the said The Commercial National Bank of Nashville, within said district, the drawers of said check aforesaid, to wit, Dobbins & Dazey, as he, the said Marcus A. Spurr aforesaid, then and there well knew, not then and there having on deposit with said The Commercial National Bank of Nashville, Tennessee, an amount of money equal to the amount specified in

said check, contrary to the statute in such cases made and provided and against the peace and dignity of the United States.

JOHN RUHM, *U. S. Att'y.*

Endorsed: Witness E. P. Moxey called and sworn by me to give evidence before the grand jury on the within indictment this 19th day of September, 1893, and on whose evidence this indictment was found. Travis Winham, foreman of the grand jury. A true bill. Travis Winham, foreman of the grand jury, Davidson county. John Ruhm, U. S. district attorney. Filed Sept. 19, 1893. H. M. Doak, clerk, by E. L. Doak, D. C.

187 On Tuesday, May 22nd, 1894, the following order was entered:

UNITED STATES
v.
MARCUS A. SPURR. } 7994. 8078. 8139.

The above-styled causes came on this the 22nd day of May, 1894, to be heard before the court upon the motion of the United States attorney—present, the defendant in proper person and by attorney—to consolidate the causes. Upon consideration thereof it is ordered that these causes be consolidated and heard together as cause No. 7994.

Entry, March 30th, 1896.

UNITED STATES
vs.
MARCUS A. SPURR. } 7994. Consolidated.

Came the United States attorney and the defendant, in proper person and also by his attorneys, and the said defendant being charged upon the indictment pleads not guilty thereto, and for his trial puts himself upon the country, and the said attorney for the United States doth the like; and thereupon came a jury of good and lawful men, to wit, John Doak, C. P. Cullom, Matt Patterson, V. L. Blanton, T. H. May, J. L. Lamberson, J. A. Campbell, S. M. Cowles, Matt Ethridge, W. B. Wyatt, Dr. Wash. Huddleston, and Arch. G. Moore, who, being duly elected and sworn well and truly to try the cause at issue, after hearing a part of the evidence in the cause, were respited until tomorrow morning.

188 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of parts of the record made pursuant to stipulation filed in the Supreme Court of the United States February 20, 1899, in the case of Marcus A. Spurr *vs.* The United States of America, No. 502, October term, 1898, as the same remains upon

the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the sixth circuit, at the city of Cincinnati, Ohio, this twenty-fifth day of February, 1899.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

189 [Endorsed:] File No. 17,033. Supreme Court U. S., October term, 1898. Term No., 448. Marcus A. Spurr, petitioner, vs. The United States. Supplemental return to writ of certiorari. Filed Feb'y 27, 1899.